Argued 20-4-14 Nov. 6. 1894

Affirmed

Fitch

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~553.~~ 32956

SAMUEL V. MAYS AND CHARLES W. HORNOR, ASSIGNEES OF AUGUST BORN, A BANKRUPT, PLAINTIFFS IN ERROR,

vs.

FREDERICKA FRITTON.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

FILED DECEMBER 5. 1872.

Hunt

Oct 2. 1894

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IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

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1 The United States of America to Fredericka Fritton, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the first Monday of December next, pursuant to a writ of error, filed in the clerk's office of the supreme court of the State of Pennsylvania, wherein Samuel V. Mays and Charles W. Hornor, assignees of August Born, a bankrupt, are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable William Strong, associate justice of the Supreme Court of the United States, this first day of March, in the year of our Lord one thousand eight hundred and seventy-two.

W. STRONG.

2 On this fifth day of March, in the year of our Lord one thousand eight hundred and seventy-two, personally appeared Charles F. Hornor, before me, the subscriber, a notary public for the city & county of Philadelphia, and makes affirmation that he delivered a true copy of the within citation to Fredericka Fritton, personally, this day.

CHA'S F. HORNOR.

Affirmed to and subscribed the fifth March, A. D. 1872.

[SEAL.] SAM. B. HUEY,
Notary Public.

3 In the supreme court of Pennsylvania, eastern district.

Among the records thereof it is contained as follows:

4 COPY OF RECORD.

In the district court for the city and county of Philadelphia.

Auditor's report.—Original.

THE AMERICAN FIRE-INS. CO., ASSIGNEES, &C., *vs.* AUGUST BORN. } Lev. facias, June T., 1868, Nos. 420–421.

District court.

To the honorable the judges of the said court:

The auditor appointed by the court to distribute the fund raised by the above writs, respectfully reports:

That having given notice of his appointment, and of the time and place of meeting, to the parties interested, by advertisements twice successively in the Legal Intelligencer, a paper published in the city of Philadelphia, and also for ten successive days (Sundays excepted) in the Press, a daily newspaper of said city, copies of which are hereunto annexed, marked, respectively, A and B, and having also posted a copy of said notice in the office of the prothonotary of said court six days before the hearing, agreeably to the rule of the court in such case made and provided, he was, at the said time and place, and at subsequent

5 meetings, attended by A. V. Parsons, esq., of counsel for Fredericka Fritton, (late Spielberger,) surviving executrix of Joseph Spielberger, a judgment creditor, D. C., D. S. B., D. 67, No. 355, dated and entered January 16th, 1868, for $4,500; G. W. Deidrich, esq., of counsel for Louis Schwarzwalder et al., trustees, mortgagees, of premises sold, for $2,000; Jno. A. Clark, esq., of counsel for G. Rappold, a judgment creditor, D. C., D. S. B., D. 67, No. 389½, entered January 20th, 1868, for $1,000; Geo. W. Thorn and H. R. Warriner, esqs., of counsel for C. W. Hornor and S. V. Mays, assignees in bankruptcy of August Born, the defendant, and by the said assignees in person; Geo. W. Thorn esq., of counsel for F. Blackburn, jr., and W. Massey et al., judgment creditors; H. R. Warriner, esq., of counsel for John Eddy et al., judgment creditors, and by August Born, the defendant, in person.

The fund in court ($7,247.65) arises from the sale, by the sheriff, of the individual real estate of the said August Born, under proceedings instituted on two mortgages of the premises, executed by him in the year 1862, both of which were paid by the sheriff out of the proceeds of sale.

It was in evidence before the auditor, that the defendant, August Born, and his co-partner, Reinhold Vollmer, were individually, and as co-partners, adjudged bankrupts by decree of the district court of the United States for the eastern district of Pennsylvania, on the 31st January, 1868, on the petition of F. Blackburn jr., a creditor. The deed of assignment of said estate in bankruptcy to C. W. Hornor and S. V. Mays dated March 30th, 1868, recorded in the office of recorder of deeds for the city and county of Philadelphia, in miscellaneous book J. T. O., p.

6 568, was also in evidence.

At the meeting of November 9th, 1868, Mr. Thorn, of counsel for Messrs. Hornor and Mays, assignees in bankruptcy, claimed the entire fund, on the grounds—

First. It is the property of a bankrupt; and by reason of said bankruptcy all his estate passed to the assignees.

Second. He proposed to attack Mrs. Fritton's judgment, on the ground that the same was given in fraud of the provisions of the bankrupt law, and that the obligee in that judgment, and her agent, through whose means the said judgment was procured, had reasonable cause to believe that the obligor was a bankrupt, and contemplated bankruptcy at the time the judgment was given.

Third. That the obligee is the mother-in-law of the obligor, August Born, and that in contemplation of bankruptcy, he gave this judgment with the intention of preferring her by way of security for a past debt.

Fourth. He further proposed to attack the consideration of that judgment, and to require Mrs. Fritton (the claimant) to produce evidence that the money was loaned long before the judgment was given, or that the money was borrowed at any time. And he further proposed to show that the said judgment was given with the intention to hinder and delay the proper creditors of the defendant from obtaining payment of their just debts.

Mr. Parsons, or Mrs. Fritton, the judgment creditor, denied all the allegations made by the counsel for the assignees in bankruptcy, except that the plaintiff in the said judgment is the mother-in-law of the defendant, and asked that the auditor should state and certify to the court, that the plaintiff in said judgment demands an issue before the district court for the city and county of Philadelphia to try these disputed facts.

The demand, in writing, for said issue, accompanied by affidavit of

the claimant, was filed with the auditor, on the 10th day of November, 1868, and is hereunto annexed, marked "C."

7 The first lien upon the fund is a mortgage of the premises in question for $2,000 (with interest thereon due from January 21st, 1868, to 6th July, 1868, the day of sale,) executed by said August Born to Louis Schwarzwalder, F. Gramlich, and F. Doll, trustees of Almania lodge of the Independent Order of Odd Fellows, dated January 21st, 1864, recorded at Philadelphia, January 23rd, 1864, in mortgage-book L. R. B., No. 1, page 182, payable one year after date.

The validity of this mortgage was satisfactorily established, and, with the consent of all the parties in interest, the auditor respectfully recommends that it be paid out of the fund, pending the determination of the issue herein reported as demanded.

The next lien of record in the order of payment (unless it should hereafter appear that a judgment in favor of the United States, obtained in the district court U. S. for E. D. of Pennsylvania, on 27th June, 1866, against said defendant for $1,000, upon which $700 has been paid, is entitled to come in on the fund) is the judgment of Fredericka Fritton, represented by Mr. Parsons, and as to the right of which to be paid out the fund in court, the issue has been demanded.

The auditor, therefore, does not report a distribution, but certifies the demand for the issue, in accordance with the rule of court in such case provided.

Respectfully submitted.

EDWIN T. CHASE, *Auditor.*

NOVEMBER 10TH, 1868.

Affidavit of Mrs. Fritton annexed.

FREDERICKA FRITTON, the plaintiff in said judgment, being

8 duly sworn according to law, doth declare and say, that the fund in court is not the property of the alleged bankrupt, and that it did not pass to his assignees in bankruptcy.

2nd. That she denies that the said judgment was given in fraud of the provisions of the bankrupt law.

3rd. That she denies that she and her agent, through whose means said judgment was procured, had reasonable cause to believe that, at the time, the said obligor was a bankrupt, and contemplated bankruptcy when it was given.

4th. That it is true she is the mother-in-law of the said obligor, but she denies that the said August Born gave said judgment in contemplation of bankruptcy, and with the intention of preferring her for a past debt; at all events, no such intention was manifested or declaration made when the said judgment-bond was given to her, nor did she accept it on such terms.

5th. This deponent asserts that the money loaned, and which was the consideration for which said judgment-bond was given, was loaned by her to the said defendant long before the said bond was executed, a part of it some years before the date thereof.

6th. And this affiant denies that the said judgment was given for the purpose of hindering, delaying, & defrauding the creditors of said Born. And, inasmuch as these material facts have been asserted on the one side, and denied on the other, she has, by her counsel, demanded an issue, to try all these disputed facts before a jury, in the court where the fund is now held.

FREDERICKA A. FRITTON.

Sworn and subscribed before me November 10th, 1868.

J. P. DELANEY,
Alderman.

9 On this twentieth day of November, 1868, we acknowledge having received notice of the intended filing of the foregoing report, in the district court for the city and county of Philadelphia, on the 7th day of December, 1868.

A. V. PARSONS,
Att'y for F. Fritton.
THORN, *For Assignees.*
JOHN A. CLARKE,
For Gottfried Rappold, whose claim is withdrawn.
G. W. DEDRICK,
Att'y for Mortgagee.
CHARLES W. HORNER,
For Self & S. V. Mays, Assigne's.
H. R. WARRINER,
For Assigne's & for Eddy & Wilbur, Jw'g. Cred.

THE AMERICAN FIRE-INSURANCE COMPANY
v.
AUGUST BORN.

Before Edwin T. Chase, auditor to distribute the money arising from the sale of property under a levari facias D. C., June T., 1868, Nos. 420, 421. Nov. 9, 1868.

Fredericka Fritton, late Spielberger, surviving executrix of Joseph Spielberger, late of Philadelphia, deceased, claims out of the fund for distribution the sum of four thousand five hundred dollars on a
10 judgment entered under a bond and warrant of attorney, dated the 16th day of January, 1868, the same day, Dec. T., 1867, No. 355, D. S. B.

Charles W. Horner and S. V. Mays, alleged assignee' in bankruptcy, by their attorney, George W. Thorn, esq., appears and claims the whole fund in court, and allege as follows:

1. That this fund is the property of the bankrupt, and that, by reason of his bankruptcy, all of his property passed to his assignees.

2. That the judgment to Mrs. Fritton was given in fraud of the provisions of the bankrupt law.

3. That the obligee & her agent, through whose means the said judgment was procured, had reasonable cause to believe that, at the time, the obligor was a bankrupt, and contemplated bankruptcy when it was given.

4. That the obligee was the mother-in-law of the obligor, and that the obligor gave this judgment in contemplation of bankruptcy, with the intent of preferring her for a past debt.

5. That the counsel for the assignees attacks the consideration of said judgment, and denies that the money was loaned to the plaintiff long before the judgment-bond was given.

6. That the judgment was given for the purpose of hindering, delaying, and defrauding the creditors of the obligor.

And the counsel for the said Fredericka Fritton denies all the above allegations, and demands that the auditor certify such denial to the

court; and that she, by her counsel, demand an issue to try the above facts, which are disputed by the said judgment-creditor.

A. V. PARSONS,
A'ty for Claimant.

11 In the district court for the city and county of Philadelphia.

THE AMERICAN FIRE-INSURANCE CO., ASSIGNEE, &C., *v.* AUGUST BORN. } Lev. fa. June term, 1868. No. 420.

The auditor, appointed by the court to make distribution of the fund arising from the sale under the above writ of the following-described real estate, to wit:

All that certain lot or piece of ground, with the buildings thereon erected, situate in the twentieth ward of the city of Philadelphia, at the northeast cor. of Thompson street and Thirty-first street, containing in front or breadth on said Thompson street 115 feet, and extending in length or depth northward of that width, at right angles with said Thompson street, along the east line of said Thirty-first street 150 feet—

Will meet the parties interested, for the purpose of his appointment, on Monday, October 12, 1868, at 3 o'clock p. m., at his office, No. 615 Walnut st., in the city of Philadelphia, when and where all persons interested will make their claims, or be debarred from coming in on said fund.

oct 2-2t* EDWIN T. CHASE, *Auditor.*

12 *Auditor's supplemental report.—Filed May 13th*, 1871.

That since the filing by him of an interlocutory report in the above case, on 7th December, 1868, the issues therein reported, and which were subsequently ordered by the court, have been disposed of, as will fully appear by reference to an exemplification of the record, hereunto annexed and marked Exhibit "A."

That, on the 18th March, 1871, the court, by an order then made, referred the above case back to the auditor, "with directions to distribute the money in accordance with the law and the facts as found by the verdict of the jury, and to report the same to the court."

That, in pursuance to said order, he notified the parties in interest that he had appointed 5th April, 1871, at 4 o'clock p. m., at his office No. 615 Walnut street, in the city of Philadelphia, for a meeting and hearing of said parties, when and where he was attended by A. V. Parsons, esq., of counsel for Mrs. Fredericka Fritton, executrix, judgment-creditor; H. R. Warriner, esq., of counsel for John Eddy et al., judgment-creditors, and by C. W. Hornor, esq., who appeared for himself and S. V. Mays, esq., as assignees in bankruptcy of August Born, bankrupt, and the defendant in the executions.

The first judgment on the searches, which appears to be a lien on the fund in court, is in favor of the United States, obtained in the U. S. D. C. for the E. D. of Pa., 27th June, 1866, to May sessions, 1866, No. 21, for $1,000.

This judgment, which was for a penalty under the internal rev.
13 law, was alleged to have been paid long since, and testimony was taken which satisfied the auditor that, although it appears to be unsatisfied of record, there is nothing due to the United States, the same having been compromised and settled by defendant, for the sum of

$700, which was paid with the approval of the attorney U. S. E. D. of Pa. It cannot, therefore, come in on the fund in court. This judgment was not represented before the auditor, although the district attorney was personally notified by him of these proceedings.

The next lien of record, in the order of payment, is the judgment in favor of Mrs. Fredericka Fritton, in this court, to Dec. T., 1867, No. 355, D. S. B., obtained January 16th, 1868, for $4,500.

This judgment was entered upon a bond and warrant of attorney, dated on the same day on which judgment was entered, at which time, or shortly before, the said August Born was engaged extensively in business in this city, as a brewer.

It was in evidence before the auditor, that the real estate of the said August Born, a portion of the proceeds of the sale of which is now in court for distribution, was sold by the sheriff on 6th July, 1868, under the two above-mentioned writs of levari facias, issued upon judgments obtained on two separate mortgages of said premises, made by said Born. These mortgages, and some other debts of record, were paid by the sheriff, and the residue of the fund was paid into court.

Another mortgage of the same premises has since been paid by direction of this court, upon the interlocutory report of the auditor, heretofore referred to.

It was also in evidence, and admitted, that, on 31st January, 1868, the defendant, August Born, was proceeded against in this judicial district, as an involuntary bankrupt, and, after a trial by jury, he was adjudicated a bankrupt, on 20th February, 1868. The assignment of
14 his estate in bankruptcy to C. W. Horner and S. V. Mays, esquires, dated 30th March, 1868, was also in evidence.

Under the order of court of March 18th, 1871, referring the case back, it becomes the duty of the auditor to consider and determine the legal status of the parties claiming the balance of the fund, since the determination of the issues hereinbefore referred to.

The issues awarded by the court were—

First. Whether, at the time the warrant of attorney upon which judgment D. 67, 355, was entered, was given by the said August Born to the said Fredericka Fritton, he, the said August Born, was insolvent?

Second. Whether, at the time of the giving of the said warrant of attorney, the said Fredericka Fritton had reasonable cause to believe that the said August Born was insolvent?

Third. Whether the said warrant of attorney was given by the said August Born to the said Fredericka Fritton, to secure the payment of a prior debt?

Fourth. Whether the said warrant of attorney was given to the said Fredericka Fritton as a preference over the other creditors of August Born?

In said issues the assignees in bankruptcy were plaintiffs, and the said Fredericka Fritton the defendant.

On 21st January, 1871, the jury found as follows, viz:

On the first issue, for the plaintiffs.

On the second issue, for the defendant.

On the third issue, for the plaintiffs.

On the fourth issue, for the defendant.

15 And on the 10th March, 1871, a rule for a new trial was refused by the court.

Mr. Parsons, of counsel for Mrs. Fritton, claimed the amount of her judgment, with interest to the date of the sheriff's sale, contending that

the finding of the jury upon the second and fourth issues was conclusive, and entitled her to payment from the fund; and cited Re Joseph B. Wright, 2 B. R., 155; Buckingham vs. McLean, 13 Howard, 150; Wilkinson's appeal, 4 B., 284; Miller vs. Black, 1 B., 420; Reigert vs. Small, 2 B., 287; Wilson vs. Day, 2 Burroughs, 830; Ex-parte Hugh Campbell, 7 Law Reg., 102; Ex-parte W. Burns, 7 Law Reg., 105; Re Wadsworth vs. Tyler, 2 B. R., 101; Re W. S. Locke, 2 B. R., 123; In re J. M. Rosenburg, 3 B. R., 33; and Humphreys vs. Maitland, [a late case in this court.]

He also argued that the finding of the jury in favor of the plaintiffs, on the third issue, did not affect his position, because the proceedings against Born in bankruptcy were involuntary.

Mr. Hornor, in behalf of himself and Mr. Mays, as assignees in bankruptcy, claimed the fund in court, and contended that, under the findings of the jury, Born was bankrupt on the 16th of January, 1868, the day on which he executed the warrant of attorney to confess judgment; that the warrant was given to secure the payment of a prior debt; and that, although the judgment was conclusive as to Mrs. Fritton and Born, it gave her no lien upon the proceeds of the sheriff's sale, and was a contemplated fraud upon creditors and the provisions of the bank-
16 rupt law. It was also argued that, although the jury found that Mrs. Fritton had no reasonable cause to believe that Born was insolvent when he gave the warrant of attorney, and that the same was not given as a preference over his other creditors, it was such a fraud on the bankrupt act by Born as would exclude her from coming in on the fund, the jury having found that the judgment was confessed to secure the payment of a prior debt, and that Born was insolvent when he gave the judgment.

Mr. Hornor, in support of his views, cited Clark vs. Douglass, 12 Sm., 414; Thompson's appeal, 7 Smith, 175; In re Pavitt, 12 Smith, 500; In re Rogers, 2 Bank. Reg., 129; Campbell vs. Bank, 3 Bank. Reg., 124; Rohrer's appeal, 12 Smith, 500; Shank's appeal, 9 Casey, 371; Grubb vs. Cottrell, 12 Smith, 23; Heishey vs. Whiting, 14 Wright, 244; and numerous other authorities, and particularly the 35th sec. of the bankrupt act of March 2nd, 1867.

The auditor has carefully examined the authorities cited by counsel, and it becomes his duty to apply the law to the questions involved, and to reconcile what was contended by the assignees in bankruptcy were conflicting findings of the jury, and to determine how far those findings affect the relation of Mrs. Fritton to other creditors of the bankrupt, and her right as a lien creditor to participate in the fund in court under the bankrupt act.

The only sections of that act which are necessary to be considered or referred to, are the 35th and 39th sections.

The 35th section deals with fraudulent preferences and conveyances, both as affecting the bankrupt and the preferred creditor; and the 39th sedtion defines what are to be deemed acts of bankruptcy, in-
17 cluding transfer of property, with intent to give a preference to creditors; and it embodies some of the provisions of the 35th section.

There are numerous authorities upon the points involved, to some of which the auditor refers, and, as they are all the decisions of judges of the courts having jurisdiction in bankruptcy, they are entitled to weight, as containing the law applicable to this case.

Judge Shipman, (in re Wadsworth vs. Tyler, 2 Bank. Reg., 101,) in speaking of the 35th section, says: "This is the one which relates

particularly to fraudulent preferences and conveyances, and undoubtedly was intended to declare precisely under what circumstances any appropriation of the property of an insolvent debtor for the benefit of any person, whether to a creditor, or by way of sale to a stranger, should be defeated * * * * . The 39th section of the act defines what acts of the debtor shall be considered sufficient ground for declaring him a bankrupt, on petition of a creditor. Certain dispositions of the debtor's property are included among these acts, and the right of the assignee to recover from the person to whom the transfer may have been made is again declared in substantially the same terms as in the 35th section, except that the word 'or' is used instead of 'and,' when referring to the reason the creditor may have to believe in the insolvency of the debtor, and the intent with which he disposes of his property in the given case. In one section the conveyance can only be defeated by proof that the creditor, or vendor, had reason to believe that the debtor was insolvent and intended a preference or a fraud, while in the other, proof of either one is sufficient. After a careful consideration of the question, I cannot bring my mind to the conclusion that any such distinction was intended by the legislature. No good reason has been shown in support of the claim, beyond the literal reading, and none is perceived by the court. I therefore conclude that they should be construed as speaking the same lan-
18 guage on this point, and as the rule prescribed by 35th section is more consonant to reason and security in the transaction of business, I hold that it is the one intended, and the distinction raised by the letter of the 39th section must yield."

"These two sections," says Judge Blatchford, (in Black vs. Secor, 1 Bank. Reg., 81,) "are in pari materia, and must be construed together."

He also says "there is, however, no conflict between them, and they are of the same purport and tenor."

Judge Shipman, in the case referred to, also says: "It will be seen at a glance that this (35th) section renders the transfer of property of the insolvent debtor void only when the party benefitted by such transfer, or receiving it, has reason to believe both that the debtor is insolvent, and that a fraud on this act was intended." * * * * * * "Under this section of the bankrupt act, they (the courts) have no authority to declare a transfer void unless the party who receives it has reason to believe that it was intended to prefer one creditor over another, or, in some way, to defeat or delay the operation of the act."

It was held by Judge Blatchford (in re Rosenberg, 3 Bank. Reg., 33,) that a chattel mortgage, executed within seven days of the filing of the petition in bankruptcy, $250 of which was for a prior indebtedness and $1,000 for a then present consideration, was valid where there was no evidence that the mortgagee had reasonable cause to believe that it was mode in fraud of any provisions of the bankrupt act.

It was also held (in Campbell vs. Traders' Bank, 3 Bank. Reg., 124,) that "where a man acts without knowledge of the condition of the party, or of anything to create a suspicion of his solvency, and in good faith obtains a payment or security, then the bankrupt law will not interfere with it."

The same principle was also decided by the late Judge Field,
19 (in re John B. Wright, 2 Bank. Reg., 155,) citing Buckingham vs. McLean, 13 Howard, 150, who also defines the meaning of the term "insolvency" as used in the bankrupt law, and holds that the

word "bankruptcy," as also therein used, means something more than "insolvency," and he refers to a decision of Judge Nelson, (in Bank vs. Truax, 1 Bank. Reg., 146,) in which he says: "Insolvency, within the meaning of the bankrupt act, when applied to traders, means inability to pay debts in the ordinary course of their business, as persons carrying on trade usually do."

It seems, therefore, to be essential, that to deprive a creditor of the security, who has apparently been given a preference by one in an insolvent condition, there must be shown, first, reason on the part of the creditor to believe that the debtor intended a fraud on the act; and, second, that the creditor had reasonable cause to believe that the debtor was insolvent at the time the preference was made or security given.

The jury, in their findings upon the issues framed, absolved Mrs. Fritton from all fraud & collusion with the bankrupt, or guilty knowledge of his condition and intent, at the time the warrant of attorney was given, and there is no evidence before the auditor to show that Born intended a fraud upon the bankrupt act. There is no evidence whatever to infer that Mrs. Fritton had reason to believe that Born contemplated bankruptcy when he gave her the bond and warrant of attorney, and, in the opinion of the auditor, the findings of the jury are reconcilable and consistent with the decisions herein cited.

The authorities referred to and quoted are conclusive to his mind that, by the findings of the jury upon the issues as framed, the said judgment in favor of Mrs. Fritton is a valid lien, and entitled to come in upon the fund in court.

20 He therefore reports the following distribution—

Fund paid into court by the sheriff		$7,247 65
Deduct therefrom mortgage heretofore ordered to be paid by the court		2,055 00
Leaving for present distribution		5,192 65
From which must first be deducted the expenses of this audit, viz:		
Auditor's fee (interlocutory and final reports)	$300 00	
Advertising	31 65	
Searches	5 50	
Proth'y's comm., checks, &c	88 35	
do. cost of issues and exemplification of same	13 00	
		438 50
Leaving for distribution		$4,754 15
Which is awarded, as follows:		
To A. V. Parsons, esq., att'y for Fredericka Fritton, the amount of judgment D. S. B., D. 67, 355, $4,500, with interest to July 6th, 1868, and $1.25 costs		4,628 75
Leaving a balance of		$125 40

which is awarded to C. W. Horner and S. V. Mays, esquires, assignees in bankruptcy of the estate of said August Born, bankrupt.

The annexed searches disclose a judgment against August Born, in favor of G. Rappold, obtained in this court on the 20th January, 1868, D. S. B., D. 67, 389½, for $1,000. This judgment, which was entered prior to the proceedings in bankruptcy, was represented before the auditor at the first meeting, held October 12th, 1868, by John A.
21 Clark, esq., of counsel for Rappold, but at a subsequent meeting the auditor was informed by Mr. Clark that no claim upon the fund would be made under it. The said balance of $125.40 is therefore awarded to the assignees in bankruptcy.

All which is respectfully submitted.

EDWIN T. CHASE, *Auditor.*

The prothonotary of the district court finds the following judgments against August Born, from October 19th, 1862, to the 20th October, 1868:

Jno. M. Hummel	J. '66,	113,	June 5, '66	$2,800	
Phil. & South S. M. Co.	J. '67,	115,	Oct. 15, '67	241	49
F. Fritton, late Spielberger	D. '67,	355,	Jan. 16, '68	9,000	
C. Rappold	"	389½,	Jan. 20, '68	1,000	
John Eddy et al.	"	1490,	Mar. 2, '68	2,388	34
F. Blackburn, jr.	"	1530,	"	4,771	67
W. Massey et al.	"	1557,	"	5,357	91
Amer. Fire-Ins. Co.	M, '68,	1482,	May 23, '68	1,044	
Same	"	1483,	"	3,162	

Certified by—

D. A. ALLISON, *Pro Proth'y.*

22 *Copy of exceptions to the report in the court below.*

The auditor erred—

I. In disregarding the various provisions of the U. S. bankrupt law, in regard to preferences given by bankrupts.

II. In validating a judgment entered upon warrant of attorney not given in good faith and for present consideration, contrary to the 14th section of the U. S. bankrupt act.

III. In giving Mrs. Fritton a priority over the other creditors of the bankrupt, contrary to the 27th section of the U. S. bankrupt act.

IV. In disregarding the first and third findings of the jury, that defendant was insolvent at the time of giving the said warrant of attorney, and gave it to secure the payment of a prior debt.

V. In perfecting and giving validity to a lien which, as to third persons, had never been completed by the parties, and was inoperative.

VI. In his construction of the fourth finding of the jury, which says that the warrant of attorney was not given to be used to obtain a preference.

23 VII. In treating as conclusive the second and fourth findings of the jury, the said issues being immaterial.

VIII. In not awarding the fund to these exceptants.

IX. In awarding the fund to Mrs. Fritton.

Appellants make the following—

Assignment of errors.

First. The lower court erred in granting an issue to Mrs. Fritton.

Second. And in not entering up judgment in favor of the appellants, on the rule of judgment non obstante veredicto.

Third. And in pronouncing judgment as the mere conclusion of law upon the fourth finding of the jury; whereas the case was a chancery case and should have been tried as a chancery case by the modes of proceeding known to courts of equity.

Fourth. Also, in disregarding the various provisions of the U. S. bankrupt law in regard to preferences given by bankrupts.

Fifth. In validating a judgment entered upon warrant of attorney, not given in good faith and for present consideration, contrary to the 14th section of the U. S. bankrupt act.

24 Sixth. In giving Mrs. Fritton a priority over the other creditors of the bankrupt, contrary to the 27th section of the U. S. bankrupt act.

Seventh. In disregarding the first and third findings of the jury, that defendant was insolvent at the time of giving said warrant of attorney, and gave it to secure a prior debt.

Eighth. In perfecting and giving validity to a lien which, as to third persons, had never been perfected or completed by the parties, and which was inoperative.

Ninth. In the construction of the fourth finding of the jury, which says that the warrant of attorney was not given to be used to obtain a preference.

Tenth. In treating as conclusive the second and fourth findings of the jury, the said issues being immaterial.

Eleventh. In not awarding the fund to these exceptants.

Twelfth. In awarding the fund to Mrs. Fritton.

25 *Argument.*

Appellants contend that, under the first and third findings of the jury, Born was bankrupt on the 16th January, 1868, and that the warrant of attorney was given by him to Mrs. Fritton to secure the payment of a prior debt. The judgment of that date, therefore, tho' conclusive, perhaps, as to Mrs. Fritton and Born, bore no lien upon the proceeds of the sheriff's sale of real estate, because the judgment was a contemplated fraud upon creditors, and the provisions of the United States bankrupt law. That, under the laws of the United States, Mrs. Fritton could not be awarded the fund in court, for to do so would be to accomplish a legal fraud upon the bankrupt's creditors, which was yet inchoate, by giving an illegal preference to Mrs. Fritton.

Mrs Fritton contends that, her judgment having been found by the jury to be, as to her, in good faith, and not given to her as a preference, the lien of the judgment upon the fund is legal, and should be enforced by giving to her the full amount thereof.

Both parties, the assignees and Mrs. Fritton, acquiesce in the mode in which the issues were framed and tried; and no writ of error from the trial thereof could now be had. The questions presenting themselves are: First. Was the order granting the issue to Mrs. Fritton legal and proper? Second. What is the effect of the verdict upon the distribution of the fund? But, as relief from all judgments of distribution, which are judgments in rem, is by appeal, and not by writ of error, and as an appeal brings up all the facts, and all the law applica-

26 ble to them, the enquiry is reduced to this: who is entitled to the fund in court—Mrs. Fritton or Born's assignees?

We have here the case of two innocent parties claiming the same fund, arising from the sale of the bankrupt's real estate. Both parties are admitted to be free, at the outset, from all fraud, actual or legal. The jury virtually so find; but the same jury declare that Born was insolvent and gave the warrant of attorney to secure the payment of a prior debt. These facts are conclusive. Under the U. S. bankrupt law, no lien can be good, even if pursuant to any statute of the United States, or of any State, if made without good faith and for present considerations.

See third proviso of section 14 of the act.

"A fraudulent preference is altogether the act of the bankrupt himself, and the knowledge of the creditor preferred, or his privity to the circumstances of the fraud is not to be taken into consideration in estimating whether a transaction is or is not a fraudulent preference." Davidson vs. Robinson, 3 Jur., N. S., 791; Summer's appeal, 4 Harris, 169; Stevenson vs. Newnham, 16 Law & Eq., 408. So, a mortgage by an insolvent debtor, to secure a pre-existing debt, is a fraudulent preference and an act of bankruptcy. In re E. P. Rogers, 2 Bank. Reg., 129.

A power of attorney to confess judgment, given by a firm having reason to believe itself insolvent, is a preference, and the firm cannot aver that no preference was intended. Campbell vs. Trader's Bank, 3 Bank Reg., 124.

The rights of the assignee relate back to the time of the judgment confessed, and he can claim the proceeds of the execution before the final decree of State court for distribution. Rohrer's appeal, 12 Sm., 500.

27 The whole aim and intent of the bankrupt act was to make the debtor's property the common pledge of all his creditors, who are "to share in the bankrupt's property and estate pro rata, without any priority or preference whatever." (Section 27th of the act.) Hence, all acts of payment, pledge, assignment, transfer, conveyance or other disposition of his property, with a view to give a preference, or "prevent the property from being distributed under this act, or to defeat the object of, or in any way impair, hinder, impede, or delay the operation and effect of" the act, are void, if made within four and six months to a creditor who has reasonable cause to believe his debtor insolvent or acting in contemplation of insolvency; "and the assignee may recover the property or the value thereof, as assets of the bankrupt." (See section 35.)

Whilst the jury find no fraud in Mrs. Fritton, they find, just as clearly, the legal fraud of Born. He was decreed an involuntary bankrupt, as of 31st January, 1868. No one can be forced into bankruptcy but he who is guilty of a fraud under the act. One of the frauds thus perpetrated was the giving of this warrant of attorney to secure the payment of a prior debt. (See 39th section.)

Born, therefore, is a fraudulent bankrupt; and it may be admitted, a. g., that if Mrs. Fritton knew not, or had no reasonable cause to believe that Born was insolvent, and if Born's fraud had been consummated, the assignees could not recover "the property or the value thereof" from her.

But the fraud has not been consummated; it is still in fieri, and no injury to creditors has yet accrued. We have the consilium fraudis, but not the eventus damni. We are, as yet, without the damnum et injuria.

The assignees have no right of action against Mrs. Fritton, to recover "the property or the value thereof," for, as yet, she has received neither, and done no completed wrong to Born's creditors. "Fraud does not consist in mere intention, but in intention acted out." (5 C. 387, Bunn vs. Ahl.) The question here, then, is not, whether Mrs.
28 Fritton shall or shall not be compelled, by law, to give up the fruits she has derived from Born's proved legal fraud on the bankrupt act, but whether the court will now carry out the contemplated act of fraud, as found by the jury, and consummate it by judicial action.

It is respectfully submitted that this the court will never do. Your honors are trying this case as chancellors. The relief against Mrs. Fritton's judgment belongs to equity. (Souder's appeal, 7 Sm., 498; act of 16th June, 1836, section 86; Hallowell's appeal, 8 H., 217; Shenk's appeal, 9 C., 371.)

Hence the following corrollaries:

(a.) The relief from all judgments in distribution cases is by appeal.

(b.) The verdict of the jury is only advisory, not conclusive. (Baker vs. Williamson, 2 Barr., 119; Johns vs. Erb., 5 Barr., 232; Todd vs. Cambell, 8 C., 252; McGinity vs. McGinity, 13 Sm., 44.)

(c.) Specific performance can never be decreed when contrary to public policy. (2 Story's Equity, sections 736–769.)

Equality is equity. If the tendency of the debtor's act be to destroy equality among creditors, the court will not lend its aid to the completion and perfection of the act. The warrant of attorney and the judgment thereon may, in this case, be without any design to defraud, on the part of Mrs. Fritton, yet, on the ground of public policy, the warrant and judgment are condemned, both at law and equity. (Willard's Equity, 209, and many cited cases; Carr vs. Hilton—under bankrupt act 1841—1 Curtis, 230; Bradshaw vs. Klein, 7 Law Reg., 505; Blakey's appeal, 7 Barr., 449.)

29 "Between enforcing and cancelling an agreement, there is a distinction as palpable as that between an executory and an executed contract, and the ground upon which courts of equity proceed in rescinding or cancelling executed contracts, is much narrower than that upon which they refuse specific performance of an executory contract, or even decree its cancellation." (Hershey vs. Whiting, 14 Wright, 244.)

Mrs. Fritton's judgment stands in need of a decree of a court of justice to enable her to reap its fruits, "and rests on a foundation of sand." (Miller's appeal, 6 Casey, 492; Blystone vs. Blystone, 1 Smith, 373; Smith vs. Bromley, Douglas, 696.)

"Money may always be stopped whilst it is in transitu to the person who is entitled to receive it, and the court will not assist an illegal transaction in any way." (Edgar vs. Fowler, 3 East., 222; Taylor vs. Chester, L. R., 4 Q. B., 313; Collins vs. Blantern, 2 Wilson, 341.)

"Where payment is actually made (by a bankrupt to a creditor) a court of equity can give no relief, for two reasons: First, the innocent creditor to whom the money was paid cannot be deprived of his property; and next, a debt extinguished by payment cannot be reared up in order to compel the quondam creditor to enter the lists again with the remaining creditors. But where the creditor is still in petitorio, demanding preference by virtue of his real security, the court cannot listen to his claim, because to prefer him would be to forfeit the other creditors of what they are justly entitled to." (2nd Principles of Equity, 203.)

"It is fraudulent to prefer a favorite creditor; the bona-fides of that creditor vanisheth when he is made acquainted with the condition of his debtor, and he is particeps fraudis if he pretend to hold the security." (Ibid., p. 253.)

30 If the first and third findings of the jury stood alone, the assignees are entitled to judgment.

Admit, a. g., that the second and fourth standing alone would entitle Mrs. Fritton to judgment.

Standing together the rights of the parties are in equilibrio, and the assignees must recover on the principle, in equali jure, melior est conditio possidentis. "It is well settled that if a loss must fall upon one of two innocent parties, both parties being free from blame, and justice being thus in equilibrio, this maxim rules the case." (Hershey vs. Whiting, 14 Wright, 244; Grubb vs. Cottrell, 12 Sm., 23.)

The proceedings against Born's real estate took place after Born had been decreed an involuntary bankrupt, and after all his property had vested in his assignees, by judgment of bankrupt court, and assignment duly recorded in this county. (Auditor's report, page 5.) But even were the rights of these contending parties in equali jure, Mrs. Fritton should not recover, for she is here striving to make a gain, (certans de lucro captando,) whilst the creditors are striving to avoid a loss, (certantes de damno vitando.)

The jury, in finding that Mrs. Fritton had not reasonable cause to believe that Born was insolvent, impaired, in no wise, the truth of the other findings. Whilst the legal fraud is found to be in Born, the good faith of Mrs. Fritton, or her ignorance of Born's bankrupt condition, is expressly declared. So, too, when the jury find that the warrant of attorney was not given to Mrs. Fritton as a preference over the other creditors of Born, this fact must be taken as true on 16th January, 1868; and if executed, that is, had judgment been entered thereon, execution issued, the real estate condemned and sold, the money realized, and in the actual possession of Mrs. Fritton, the assignees could not, perhaps, compel her to refund. But here there has been no execution, no condemnation, no sale, and no realization of the money

31 before the bankruptcy. She precluded herself, by the very terms of her judgment, from issuing execution. Her lien had never been perfected; it was merely a general lien, not a special lien; not a jus in re, nor a jus ad rem. She was without any vested right in the property. It was not specifically pledged to her; she had no right to it until she fixed upon it a specific lien. (Baldy's appeal, 4 Wr., 331; Brown vs. Peirce, 7 Wall. U. S., 205; Grevemyer vs. Insurance Co., 12 Sm., 340, and cases and "authorities almost without limit.")

Her judgment is merely executory and provisional; and certainly, when the jury made their findings, was not a preference. It can only become a preference by the judicial action of the court. Tho' Mrs. Fritton "may have, by her judgment, a lien on the land, non constat that she will ever make use thereof, for she may recover the debt out of the goods of the defendant by fieri facias," &c., &c. (Brace vs. Marlborough, 2 P. W'ms, 491; Cover vs. Black, 1 Barr., 493.)

Before the lien of a judgment is recoguized in equity, the "judgment-creditor must have pursued the same steps as he would have been obliged to do, to perfect his lien, if the estate had been legal." (Story's Equity, section 1216 b. and note.)

On this point the jurisprudence of the country is constant. A judgment, when bona-fide, bears lien only when a levy has been made before filing petition in bankruptcy. (See all the cases quoted by the auditor,

also, Bunn's appeal, 15 Sm., 363.) Where no levy is made till after petition filed, the lien is a general lien, and requires the aid of the bankrupt court to enforce it. (Pennington vs. Sale, 1 Bank. Reg., 157; Jones vs. Leach, 1 Bank. Reg., 165.)

But here the judgment and pretended lien are fraudulent, as
32 well as contrary to public policy. "To grant the relief to the assignee is to act in accordance with the rights of creditors, and in opposition to the contemplated fraud, while to refuse it would be to aid in its perpetration." (Carr vs. Hilton, 1 Curtis' Rep., 230.)

Besides, the creditors of Born are no parties to the judgment, and Born was the trustee of his creditors; he violated his trust by confessing a judgment that injured them. "The rights of the assignees are superior to those of their assignor. Unlike him, they are not affected by his fraudulent conveyances or contracts. They claim, not through his fraudulent arrangements, but superior to them." (Tams vs. Bullitt, 11 C., 308.)

It has been shown above that the court is not bound by the findings of the jury in feigned issues. But, admitting them to be generally conclusive, still, if any of them be immaterial, or decide naked questions of law, it is clear that they are not binding upon the court. Now the fourth finding of the jury is that "the said warrant of attorney was not given to Mrs. Fritton as a preference over the other creditors of August Born."

This finding is the sole reliance of Mrs. Fritton for success, yet if the jury undertook to decide as to the effect of her judgment under the provisions of the U. S. bankrupt law, this would be a decision of a naked question of law, which, on elementary principles, could not be conclusive. But the jury have found that the warrant of attorney was not given for a preference, but as evidence of "the prior debt" due by Born; and that neither she nor Born designed that the judgment should take a place on the record as a prior lien or preference. This is the question of fact which the jury were called upon to find; they passed upon the contract or intention of the parties, and decided that the warrant of attorney took no such effect as to make it a preferred lien. And this is in exact harmony with Mrs. Fritton's own view of the
33 matter, as displayed in her affidavit for the issue, set forth on page 8, ante.

In this affidavit Mrs. Fritton does not deny Born's insolvency on 16th January, 1868, but only knowledge of it; and she expressly admits that "the money loaned, and which was the consideration for which said judgment-bond was given, was loaned by her to the said defendant long before the said bond was executed, a part of it some years before the date thereof."

With this distinct admission of a fact, "the past consideration;" which, under article 14 of the bankrupt act, destroyed her lien, there was no question of fact for the jury in the case; and the court erred in awarding an issue. The question was one of law alone, to be determined by the court, Is the judgment of Mrs. Fritton a lien on the real estate sold, and entitled to be paid out of the proceeds of such sale? (Christopher vs. Seldon, 4 Casey, 165.)

That the issues were put into shape, to facilitate trial, by the counsel of the assignees, under direction of the court, can hardly be construed as a waiver of this point.

The distinction suggested between a voluntary and involuntary bankruptcy, as to an act of fraud, seems quite misty, and of no appre-

ciable bearing on the solution of this case. (See Marks vs. Feldman, Law Rep., 5 Q. B., 275.)

We pray your honors to reverse the judgment.

Respectfully submitted.

CHARLES W. HORNOR,
For self and S. V. Mays, Assignees.

PHILADELPHIA, *25th July*, 1871.

34 In the district court for the city and county of Philadelphia.

THE AMERICAN FIRE-INS. CO. *vs.* AUGUST BORN. } Levari facias. June T., 1868. 420, 421.

And now, to wit, Sep. 22, 1868, on motion of A. V. Parsons, esq., attorney for a judgment-creditor, the court appoint Edwin T. Chase, esq., auditor to make distribution of the money paid into court.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court, this twenty-sixth day of September, A. D. 1868.

CITY AND COUNTY OF PHILAD'A. SEAL OF DIST. CT.

CHA'S B. ROBERTS,
Pro Proth'y.

Amount of fund in court	$7,247 65
Prot'y com. recording certificate, 40 c'ts for each check for judg. each claimant	86 75

35 UNITED STATES,
Eastern District of Pennsylvania, ss:

I, Gilbert R. Fox, certify that there are no unsatisfied judgments remaining on record in my office, obtained within the last five years, against August Born, except judgment vs. August Born, No. 21, May sess., 1866. Date of judgment, June 27, 1866. Bal. due, $300, $700.

[SEAL OF D. C. U. S.] JOHN B. BEAVER,
Pro Clerk District Court U. S.

PHILADELPHIA, *this twenty-first day of October, A. D.* 1868.

[5 U. S. rev. stamp.]

36 UNITED STATES,
Eastern District of Pennsylvania, sct:

I, Benjamin Pation, clerk of the circuit court of the United States, in and for the eastern district of Pennsylvania, do hereby certify that there are no unsatisfied judgments remaining on record in my office, obtained within the last five years, against August Born.

[SEAL OF C. C. U. S.] JOHN B. BEAVER,
Pro Clerk.

PHILADELPHIA, *this twenty-first day of October, A. D.* 1868.

[5 U. S. rev. stamp.]

37 On examination of the judgment-index of the district court for the city and county of Philadelphia, from October 19th, A. D. one thousand eight hundred and sixty-two, (1862,) to the twentieth day of October, one thousand eight hundred and sixty-eight, I find the following unsatisfied judgments entered therein within that period against August Born:

Jno. M. Hummel, J., '66, 113, D. S. B., Jun. 5, '66.....	$28,000	
Phil. & South, S. M. Co., J. '67, 155, Oct. 15, '67.....	241	49
F. Fulton, late Specberger, D., 67, 355, D. S. B., Jan. 16, '68.	9,000	
C. Rappold, D., '67, 389½, D. S. B., Oct. 20, '68, R. D.,.....	1,000	
John Eddy et al., D., '67, 1,490, Warriner, M'ch 2, '68.....	2,388	34
F. Blackburn, j'r, D., '67, 1,500, Thorn, M'ch, 2, '68.....	4,771	67
W. Massey et al., D., '67, 1,557, Thorn, M'ch 2, '68.....	5,357	91
American Fire-Ins. Co., M. '68, 1,482, Townsend, May 23, '68.	1,044	
Same " 1,483, " .	3,162	

Certified by—

[SEAL.] D. A. ALLISON, *Pro Proth.*

[U. S. rev. stamp.]

38 On examination of the judgment-index of the court of common pleas for the city and county of Philadelphia, from October 18th, A. D. one thousand eight hundred and sixty-two, (1862,) to the nineteenth day of October, one thousand eight hundred and sixty-eight, I find the following unsatisfied judgments entered therein within that period against Augustus Born:

M. 64, 26, claim, May 13, '64.....	$37 50
Edward Goets, J. 66, 45, Engl. Top'r, June 15, '66.....	8 00

(Written across the face of each:) "Satisfied."

Certified by—

[SEAL.] G. G. LOUDEN.

[U. S. rev. stamp.]

39 I, James Ross Snowden, prothonotary, do certify that, on examining the judgment-index of the supreme court of Pennsylvania for the eastern district, for six years prior to the twenty-first day of October, one thousand eight hundred and sixty-eight, I find no unsatisfied judgment entered within that period against August Born.

[SEAL.] CHA'S B. ROSS,
Pro Proth'y.

40 Court of quarter sessions of the peace for the city and county of Philadelphia.

I certify that I have examined the records of the aforesaid court for five years past, and do not find any unsatisfied judgments against August Born.

[SEAL OF C'T OF Q. S.] FRED. UBER,
Dep. Clerk.

OCTOBER 14, 1868.

[U. S. int. rev.]

41 All that lot or piece of ground, with the buildings thereon erected, situate in the 20th ward of the city of Philadelphia, at the northeast corner of Thompson street and Thirty-first street, containing in front or breadth on said Thompson street, one hundred and fifteen feet, and extending in length or depth northward of that width, at right angles with said Thompson street, along the east line of said 31st street, one hundred and fifty feet.

Please certify all unsatisfied mortgages of the above premises, and any conveyances of the same by August Born, since August 28, 1862.

CHASE.

J. T. OWEN, Esq., *Recorder.*

OCT. 14, 1868.

(By Wednesday, Oct. 21, '69.)

On searching the index of mortgages for the city & county of Philadelphia, I do not find any unsatisfied mortgages of the above-described premises, given by August Born, since Aug. 28, 1862, except one to Lewis Schwazwalder et al., Jun. 21, '64, for two thousand dollars.

42 On searching the index of deeds, I find no conveyances of the same premises since Aug. 28, 1862, except two, one to Francis Esele, Jun. 6, 1864, another to Samuel V. Mays et al., March 30, 1868, (an assignment in bankruptcy.)

Witness my hand and seal of office this twentieth day of October, 1868.

{ SEAL OF RECORDER OF DEEDS, &C., PHILA. CITY & CO. } M. KEYES, *Pro Recorder.*

[U. S. int. rev. stamp.]

(Endorsed:) Aug. 29, '62. A. C. H. 36, 250, 254. Jun. 23, '64. L. R. B. 1, 182, to Lewis Schwazwalder et al., Jan. 21, '64, $2,000. L. R. B., 32, 409. To Francis Ersele, Jun. 6, 1864. Miss. book, 110, 568, to Sam. V. Mays et al., Mar. 30, 1868. Assignment of bankrupt's effects.

43 District court.

AMERICAN FIRE-INSURANCE COMPANY *vs.* AUGUST BORN. } Levari facias. Nos. 420 & 421. June T., 1868.

And now, July 3, 1869, on motion of George W. Thorn and W. H. Warriner, esq'r's, attorneys for Charles W. Horner and Samuel V. Mays, assignees in bankruptcy of August Born, it is ordered that an issue, wherein the said C. W. Horner and S. V. Mays, assignees, shall be plaintiffs, and Ferdinand Fretton, and Fredericka Fretton, in her right as executrix of the will of Joseph Spielberger, defendants, be formed to try the validity of a certain judgment entered in this court on the 16th January, 1868, to December term, 1867, No. 355, D. S. B., by virtue of a warrant of attorney, dated 16th January, A. D. 1868, given by said August Born to said Fredericka Fretton, as such executrix; and it is further ordered that the issues to be tried be as follows:

Issues.

First. Whether, at the time the warrant of attorney, upon which

44 judgment D. 67, 355, was entered, was given by the said August Born to the said Fredericka Fretton, he, the said August Born, was insolvent.

Second. Whether, at the time of the giving the said warrant of attorney by the said August Born, the said Fredericka Fretton had reasonable cause to believe that the said August Born was insolvent.

Third. Whether the said warrant of attorney was given by the said

August Born to the said Fredericka Fretton, to secure the payment of a prior debt.

Fourth. Whether the said warrant of attorney was given to the said Fredericka Fritton as a preference over the other creditors of August Born.

(Endorsed:) 19. June, 1869. Horner et al. vs. Fretton. D.C. Feigned issues ordered by the court, July 3. Vide minutes in J. 68, 420, & 421. Lev. fa. Parsons for def't. Warriner & Thorn for pl'ffs.

45 Warriner & Thorn.
Parsons.

Feigned-issue docket.

C. W. HORNER AND S. V. MAYS, ASSIGNEES, *vs.* FERDINAND FRETTON AND FREDERICKA Fretton, in her right as executrix of Joseph Spielberger. } District court. June term, 1869. No. 19. Feigned issue. Lev. fa. J., '68. 420, 421.

Jan. 19, 1871.—Jury called.
" 21, " Verdict for pl'ff on 1st issue.
" " " " def't on 2nd "
" " " " pl'ff on 3rd "
" " " " def't on 4th "
Jan. 25, 1871.—Motion for a rule for a new trial.
" " " Eo die reasons filed.
M'ch 10, 1871.—Rule refused.
" 18, " This cause is referred back to the auditor, with instructions to distribute the money in accordance with the law and the facts as found by the verdict of the jury, and to report the same to the court.

46 S. V. MAYS AND CHA'S W. HORNER, ASSIGNEES in bankruptcy of Reinhold Volmer and August Born, *vs.* FERDINAND FRETTON AND FREDERICKA FRETTON, his wife, in her right, & executrix. }

Lev. fa. of June T., 1868. Nos. 420, 421. F. I. June T., 1869. No. 19.

And now, to wit, January 19, 1871, a special jury being called, comes, to wit: George R. Berrell, William More, John W. Sells, John Maxwell, Michael Mulvahill, Lewis Knox, G. W. Einwechter, John Smith, John Lindine, Jos. L. Osler, John Kline, Thomas G. Warder, who, being duly empanelled, sworn, or affirmed, do say, January 21, 1871—
Verdict for plaintiff on first count.
Verdict for defendant " second "
" " plaintiff " third "
" " defendant " fourth "

47 HORNER *vs.* FRETTON. } Of June term, 1869. No. 19. Feigned issue.

And now, to wit, March 18, 1871, the court refer the case back to the auditor, with directions to distribute the money in accordance with the

law and the facts, as found by the verdict of the jury, and to report the same to the court.

I certify the above and foregoing to be a true and correct copy of the whole record of the feigned issue as therein stated, so full and entire as the same remains in the office of the prothonotary of the district court for the city and county of Philadelphia.

SEAL OF DIST. C'T OF CITY & COUNTY PHILA.

In witness whereof I have hereunto set my hand and affixed the seal of the said court this 23rd day of March, A. D. 1871.

W. H. BENCKERT,
Pro Proth'y.

[U. S. int. rev. stamp.]

48 In the district court for the city and county of Philadelphia.

THE AMERICAN FIRE-INSURANCE COMPANY, ass'ee, &c., *vs.* AUGUST BORN. } Of June term, 1868. No. 420. J'n 16, '68.

Lev. fa. M., 68, 142; R. deb't, $1,044; int. from May 22, '68; as wr't, &c., 6.75; Cr., 12; proth., 4.87; sat. 12; lev. fa, 75.

Sold to William Massey for $26,500.00.

Sept. 28, 1868. Edwin T. Chase, esq., appointed auditor by the court.
Dec. 7, 1868. Report of the auditor filed & confirmed, nisi, Dec. 14, 1868. Issue awarded.
July 3, 1869. Issues awarded as presented on behalf of assignees.
Jan. 19, 1871. Jury called.
Jan. 21, 1871. Verdict, see F. I.
May 15, 1871. Auditor's report filed and confirmed, nisi.
May 16, 1871. Exceptions of assignees to auditor's report filed.
49 June 21, 1871. Exceptions dismissed.
July 8, 1871. The court order and direct Ja's McManes, late proth'y, to invest money p'd into court for distribution in city stock, new issue clear of tax.
June 26, 1871. Certiorari brought into office.

SEAL OF DIST. C'T OF PHILA.

Certified from the record this 28th day of August, A. D. 1871.

W. H. BENKERT,
Pro Proth'y.

50 In the district court for the city and county of Philadelphia.

THE AMERICAN FIRE-INSURANCE COMPANY *vs.* AUGUST BORN. } June term, 1868. No. 421. Lev. fa. M. 68, 1483.

R. D., $3,132; int. from May 23, '68; at'y writ, &c., 6.75; cr., 12; proth., 4.87; sat., 12; lev. fa., 75.

Sept. 22, 1868. Edwin T. Chase, esq., appointed auditor by the court.
Dec. 7, 1868. Report of auditor filed and confirmed, nisi.
Dec. 12, 1868. Rule to shew cause why the sum of $2,055, found to be due by the auditor in his report, should not be paid to Gramlich et al., trustees.

Dec. 26, 1868. Rule absolute by consent. Order of court, see minute-book No. 144, page 199.
July 3, 1869. Issues awarded as presented on behalf of ass's.
Jan. 19, 1871. Jury called.
51 Jan. 21, 1871. Verdict, see F. I.
May 13, 1871. Auditor's report filed & confirmed, nisi.
May 16, 1871. Exceptions of assignees to auditor's report filed.
June 21, 1871. Exceptions dismissed.
July 8, 1871. The court order and direct Ja's McManes, late proth'y to invest money p'd into court for distribution in city stock, new issue clear of tax.

{SEAL OF DIST. C'T OF PHILA.} Certified from the record this 28th day of August, A. D. 1871.

W. H. BENCKERT,
Pro Proth'y.

52 FREDERICKA FROTTON, LATE SPIELberger, surviving executrix of Joseph Spielberger, deceased,
vs.
AUGUST BORN.
} Of December T, 1867. No. 355. D. S. B.

Judgment entered on bond & warrant of attorney, dated 16th January, 1868, for $900.00, conditioned for the payment of $4,500 in one year from the date thereof with lawful interest on the same, payable on the 16th day of July and January, in each year:
Provided if default be made for 30 days, &c.
Jan. 16, 1868, judgment.
Certified from the record this 28 day of August, A. D. 1871.

{SEAL OF THE DISTRICT COURT OF PHILAD'A.} W. H. BENCKERT,
Pro Proth'y.

53 To the Honorable John Cadwalader, judge of the district court of the United States for the eastern district of Pennsylvania:

The petition of Francis Blackburne, j'r, of the city of Philadelphia, in the county of Philadelphia, and State of Pennsylvania, respectfully shows:

That he is a creditor of Reinhold Vollmer and August Born, who are copartners, trading under the firm-name of R. Vollmer and A. Born, and, as such copartners, have conducted and carried on business as lager-beer brewers in the city of Philadelphia, at numbers 341 & 343 North Third street, and at Thirty-first and Thompson streets, in the said city of Philadelphia, and State of Pennsylvania, for a period of one year and upwards.

That the said Reinhold Vollmer, as your petitioner is informed and believes, for a period of one year and upwards next preceding the
54 date of the filing of this petition, has resided at No. 637 North Sixth street, in the city of Philadelphia, and that he, the said August Born, as your petitioner is informed and believes, for a period of one year and upwards next preceding the date of the filing of his petition, has resided at Thirty-first and Thompson streets, in the city of Philadelphia, and State of Pennsylvania, and district aforesaid.

That your petitioner's demand is provable against the said Reinhold Vollmer and August Born, copartners as aforesaid, in accordance with the provisions of the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved

March 2, 1867; that he believes that the said Reinhold Vollmer and August Born, as such copartners, owe debts to an amount exceeding the sum of fifteen thousand dollars; that the nature of the demand of your petitioner against the said copartners is as follows, that is to say, your petitioner has a book-account against the said Reinhold
55 Vollmer and August Born, as such copartners, for malt sold and delivered by him to them between the nineteenth day of October, 1867, and the third day of January, 1868, both dates inclusive, amounting to the sum of four thousand seven hundred and twenty-six dollars, all of which is now due and unpaid.

That the said copartners, within six calender months next preceding the date of your petitioner's petition, did commit an act of bankruptcy within the meaning of the said act, to wit, in that they, the said Reinhold Vollmer and August Born, as such copartners, did heretofore, to wit, on the fourteenth day of January, A. D. 1868, then being insolvent, make to one Gustavus Bergner a sale of certain personal property belonging to them, the said Reinhold Vollmer and August Born, as such copartners, viz., a large number of casks, the precise number of which is unknown to your petitioner, but, as your petitioner is informed and believes, of sufficient capacity to hold nine hundred and ninety-
56 four barrels of beer or other liquids, which said sale of the casks aforesaid was made by the said Reinhold Vollmer and August Born, as such copartners, for the sum of seventeen hundred and five dollars, being less than the rate of one dollar seventy cents per barrel, with intent to defraud their creditors; and your petitioner is informed and believes that the said casks, at the time of the sale thereof, were worth the sum or price of three dollars per barrel, and, in the aggregate, upwards of twenty-nine hundred dollars.

And your petitioner is informed and believes that the proceeds arising from the sale of the said casks have been paid or given by the said Reinhold Vollmer and August Born, or one of them, to some of their creditors, whose names are unknown to your petitioners, with intent to prefer such creditors, in fraud of the provisions of the said act.

And your petitioner further represents that the said Reinhold Vollmer and August Born, as such copartners, or one of them,
57 with intent to evade the provisions of the said act, did, since the first day of January, 1868, sell and transfer two large fermenting-tubs to P. and P. Baltz for a price which your petitioner has not been able to ascertain; that said casks and tubs are necessary in the business of beer-brewing, and were not sold by the said Reinhold Vollmer and August Born in the usual course of their business, but, as your petitioner believes, with knowledge of their insolvency and with intent to defraud and hinder their creditors.

And your petitioner further represents, that the said Reinhold Vollmer and August Born, as such copartners, according to their own statement, made, as your petitioner is informed and believes, on or about the third day of January, A. D. 1868, were the owners of a large amount of personal property, consisting of casks, fermenting-tubs, and other utensils used in brewing, a number of wagons and horses, amounting in value to the sum of eight thousand dollars; all of which with the ex-
58 ception of personal property amounting to about five hundred dollars, has been disposed of by the said Reinhold Vollmer and August Born, as such copartners, since the first day of January, 1868, as your petitioner has been informed and believes, and the proceeds appropriated, as your petitioner believes, in violation of the provisions of the said act.

And your petitioner further represents, that the said Reinhold Vollmer and August Born, as such copartners, within the period aforesaid, being lager beer brewers, on the fourth day of January, A. D. 1868, fraudulently stopped and have not resumed payment of their commercial paper within the period of fourteen days.

And that the said Reinhold Vollmer and August Born, as said copartners, within the period aforesaid, and within said district, since the first day of January, A. D. 1868, then being insolvent, did make to one John Clump a transfer and delivery of merchandise, viz, hops,
59 amounting in value to between nine hundred and one thousand dollars, with intent to give a preference to the said John Clump, who was then liable for them as the maker of an accommodation promissory note previously made by the said Clump for their benefit, as your petitioner is informed and believes, the amount of which promissory note your petitioner has not been able to ascertain, and, therefore, is unable to state; wherefore your petitioner prays—

That they, the said Reinhold Vollmer and August Born, may be declared bankrupts, and that a warrant may be issued to take possession of their joint and several estates; that the same may be distributed according to law; and that such further proceedings may be had thereon as the law in such case prescribes.

FRANCIS BLACKBURNE, JR.,
Petitioner.

GEO W. THORN,
Solicitor for Petitioner.

60 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, ss:

I, Francis Blackburne, jr., the petitioner above named, do hereby make oath that the statements contained in the foregoing petition subscribed by me are true, so far as the same are stated of my own knowledge, and that those matters which are stated therein on information and belief are true, according to the best of my knowledge, information, and belief.

FRANCIS BLACKBURNE, JR.

Sworn & subscribed before me, this 31st day of January, A. D. 1868.
BENJ. PATTON,
U. S. Com.

In the district court of the United States for the eastern district of Pennsylvania.

61 IN THE MATTER OF REINHOLD VOLLMER and August Born, trading under the name of R. Vollmer and A. Born, against whom a petition is about to be filed for adjudication in bankruptcy. } In bankruptcy.

EASTERN DISTRICT OF PENNSYLVANIA, *ss:*

FRANCIS BLACKBURN, J'r, being duly sworn, says that he is a creditor of the said Reinhold Vollmer and August Born, who, as copartners, trading under the name of R. Vollmer and A. Born, have conducted and carried on business as lager-beer brewers, in the city of Philadelphia, at Nos. 341 and 343 North Third s't and at Thirty-first and Thompson streets, for a period of one year and upwards, and that the said Reinhold

Vollmer, for a period of one year and upwards next preceding the date of the filing of the petition of your petitioner, has resided at No. 637 North Sixth street, and that the said August Born, for a period of one year and upwards next preceding the date of the filing o' the
62 said petition, has resided at Thirty-first and Thompson, as your petitioner is informed and believes, in the city of Philadelphia, and State of Pennsylvania, and district aforesaid.

That the demand of your petitioner is provable against the said R. Vollmer and A. Born, in accordance with the provisions of the act of Congress, entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867.

That he believes that the said copartners owe debts to an amount exceeding the sum of fifteen thousand dollars.

That the nature of the demand of your petitioner against the said copartners is as follows: A book-account for malt, sold and delivered by him to the said copartners, between the nineteenth day of October, 1867, and the third day of January, 1868, both dates inclusive, amounting to the sum of four thousand and seven hundred and twenty-six dollars, all of which is now due and unpaid.

63 That the said copartners, within six calender months next preceding the date of your petitioner's petition, did commit an act of bankruptcy, within the meaning of the said act, in that, on the fourteenth day of January, A. D. 1868, being then insolvent, they did make to one Gustavus Bergner a sale of certain personal property, belonging to them, viz, a large number of casks, the precise number of which is unknown to your petitioner, but as he is informed and believes, of sufficient capacity to hold nine hundred and ninety-four barrels of beer or other liquids, for the sum of seventeen hundred and five dollars, being less than the rate of one dollar and seventy-five cents per barrel, with intent to defraud their creditors, and your petitioner, is informed and believes, that the said casks, at the time of said sale thereof, were worth the sum or price of three dollars per barrel, and in the aggregate, upwards of twenty-nine hundred dollars.

And your petitioner is informed and believes that the said copartners, or one of them, paid or gave the proceeds arising from the sale
64 of the said casks to some of their creditors, whose names are unknown to deponent, with intent to prefer such creditors, in fraud of the provisions of said act.

That the said copartners, or one of them, with intent to evade the provisions of the said act, did, since the first day of January, 1866, sell and transfer two large fermenting-tubs to I. and P. Baltz, for a price which your petitioner has not been able to ascertain; that said casks and tubs are necessary in the business of brewing beer, and were not sold in the usual course of their business, but, as deponent believes, with knowledge of their insolvency, and with intent to defraud & hinder their creditors.

And, further, that the said copartners, according to their own statement, as deponent is informed and believes, made on or about the third day of January, A. D. 1868, were the owners of a large amount of personal property, consisting of casks, fermenting-tubs, and other
65 utensils used in brewing, a number of wagons and horses, amounting in value to the sum of eight thousand dollars, all of which, except personal property to the amount of about five hundred dollars, they have disposed of since the first day of January, 1868, and as deponent has been informed and believes, have appropriated the proceeds in violation of the provisions of said act.

And that the said copartners, within the period aforesaid, being lager-beer brewers, on the fourth day of January, A. D. 1868, fraudulently stopped, and have not resumed payment of their commercial paper within the period of fourteen days.

And that the said copartners, within the period aforesaid, and within said district, since the first day of January, 1868, then being insolvent, did make to one John Clump a transfer and delivery of merchandize of said copartnership, viz, hops, amounting in value to between nine hundred and one thousand dollars, with intent to give a preference to the said John Clump, who was then liable for them, as the maker of an accommodation promissory note, previously
66 made by *by* the said Clump for their benefit, as defendant is informed and believes, the amount of which promissory note he has not been able to ascertain, and therefore cannot state.

FRANCIS BLACKBURNE, JR.

Sworn to and subscribed before me this 31st day of January, A. D. 1868.

BENJ. PATTON,
U. S. Com., at Philadelphia, Pa.

67 In the district court of the United States for the eastern district of Pennsylvania.

IN THE MATTER OF REINHOLD VOLLMER AND August Born, copartners, against whom a petition for adjudication of bankruptcy was filed on the 31st day of January, A. D. 1868. } In bankruptcy.

EASTERN DISTRICT OF PENNSYLVANIA, *ss:*

Upon filing proofs sustaining the allegations of the petition aforesaid, it is ordered that the said Reinhold Vollmer and August Born do appear at this court as a court of bankruptcy, to be holden at Philadelphia, in the county of Philadelphia, and State of Pennsylvania, and district aforesaid, on the 7th day of February, 1868, at 10 o'clock a. m., and show cause, if any there be, why the prayer of the said petition should not be granted; and

It is further ordered, that a copy of the said petition, together with a copy of this order, be served on the said Reinhold Vollmer and August Born, by delivering the same to them, personally, or by leaving the same at their last usual place of abode, in the said district, at least five days previous to the day herein required for their appearance.

SEAL OF D. C. OF U. S. } Witness the Honorable John. Cadwalader, judge of the said court, and the seal thereof, at Philadelphia, in the said district, on the 31st day of January, A. D. 1868.

G. R. FOX,
Clerk of District Court for said District.

68 In the district court of the United States for the eastern district of Pennsylvania.

IN THE MATTER OF REINHOLD VOLLMER AND August Born, copartners, against whom a petition for adjudication of bankruptcy was filed on the 31st day of January, A. D. 1868. } In bankruptcy.

EASTERN DISTRICT OF PENNSYLVANIA, *ss:*

Francis Blackburn, jr., being duly sworn, says that he served a copy of the said petition, together with a copy of the within order, on Rein-

hold Vollmer, by leaving the same at the place of residence of the said Reinhold Vollmer, No. 637 North Sixth, in the city of Philadelphia, in said district, on the first day of February, 1868, at 9.45 a. m.; and that he served a copy of the said petition, together with a copy of the within order, on August Born, by leaving the same at the place of residence of the said August Born, 31st and Thompson streets, in the city of Philadelphia, in said district, on the first day of February, 1868, at 9.20 p. m.

FRANCIS BLACKBURN, JR.

Sworn & subscribed before me this seventh February, A. D. 1868.

J. MASON,
Pro Clerk Dist. C't U. S. E. Dist. Pa.

(Indorsed:) No. , UnitedStates district court, eastern district of Pennsylvania, in the matter of , against whom a petition for adjudication of bankruptcy was filed on the day of , A. D. 18 . Order to show cause. Filed Feb. 7, 1868, 4½ p. m.

69 IN THE MATTER OF THE COMPLAINT OF
Francis Blackburne, j'r,
vs.
REINHOLD VOLLMER AND A. BORN.

In the U. S. district court for the eastern district of Penna.

And now, Feb'y 7th, 1868, on the day of the return of the warrant in this case, August Born, having appeared in person, and by his attorney, A. V. Parsons, now demands a trial by jury, of all the matters of fact alleged in said petition, and asserted and denied in his answer, this day filed under and by virtue of the provisions of the 41st section of the bankrupt act of the United States, and prays the learned judge to award an issue to be tried by a jury as required by the law.

AUG. BORN.

A. V. PARSONS,
Att'y for said Born.

70 No. 63. Manual as approved.]

Adjudication of bankruptcy on creditors' petition.

In the district court of the United States for the eastern district of Pennsylvania.

IN THE MATTER OF REINHOLD VOLLMER AND August Born, copartners, as R. Vollmer and A. Born, against whom a petition in bankruptcy was filed on the 31st day of January A. D. 1868. } In bankruptcy.

At Philadelphia, in said district, on the seventh day of February, A. D. 1868, before Hon. John Cadwalader, judge of the district court of U. S. for the eastern district of Pennsylvania.

EASTERN DISTRICT OF PENNSYLVANIA, *ss:*

This matter came on to be heard at Philadelphia, in said court, and* the said Reinhold Vollmer not appearing, pusuant to an order in that behalf heretofore made.

* After the * state what proceedings were had: whether there was or was not opposition; whether and what counsel appeared for the parties, &c.

71 And thereupon, and upon consideration of the proof in said matter,* it was found that the facts set forth in said petition were true; and it is therefore adjudged that Reinhold Vollmer became bankrupt, within the true intent and meaning of the act entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867, before the filing of the said petition, and he is therefore declared and adjudged a bankrupt accordingly. And it is further ordered, that the said bankrupt shall, within five days after the date of this order, make and deliver, or transmit by mail, post-paid, to the marshal, as messenger, a schedule of his creditors, and inventory of his estate, in the form and verified in the manner required of the petitioning debtor by the said act. And it is further ordered that for such purposes of the adjudication and warrant as may *be* requi*site*, the intervention of a register, the case be referred to B. Franklin Fisher, esq.

Witness the Hon. John Cadwalader, judge of said district court, and the seal thereof, at Philadelphia, in said district, on the seventh day of February, A. D. 1868.

[L. S. OF THE COURT.]

G. R. FOX,
Clerk of District Court for said District.
Per J. M.

(Indorsed:) Docket, case No. , page . District court of the United States, district of In bankruptcy. In the matter of bankrupt. Adjudication of bankruptcy, (on creditors' petition.) Reinhold Vollmer. Entered this day of A. D. 18 .

Clerk of District Court of said District.

72 IN THE MATTER OF THE COMPLAINT OF Francis Blackburne, jr., *against* REINHOLD VOLLMER AND AUGUST BORN.

In the district court of the United States for the eastern district of Pennsylvania.

[Filed the 31st of January, 1868, in bankruptcy.]

The answer of August Born, one of the persons against whom said complaint has been made in said case.

This respondent answering, says, as follows:

1st. That for the last three years the said Reinhold Vollmer and August Born have not carried on business at No. 341 and 343 North Third street; that this respondent, has not, as a partner with the said Vollmer, nor otherwise, carried on any business at these places in Third street; that, more than three years ago, this respondent sold all his interest in the said business carried on at that place to the said Vollmer, and has had no interest in said property, in any way whatever, nor has he now any title, interest, or claim to said property *than me.*

73 That after this respondent sold out his title and interest to said Vollmer, he is informed and believes said Vollmer, rented said property, to some third person or persons, as tenants, but with that this respondent had no concern in any way whatever, as partner or otherwise;

* After the * insert "and the arguments of counsel thereon," if counsel were heard.

that, in the year 1867, the said Vollmer and Born, as partners, rented an office in said building from Hoppel & Leib, who had before leased the said building from said Vollmer. This office was used as a convenient place for the transaction of the business these partners were carrying on at 31st and Thompson streets; nor had they anything to do with the business conducted at No'. 341 and 343 North Third street, nor has this respondent had anything to do with the business at those places since the time of the sale before spoken of, as a partner or otherwise.

2nd. That it is true that this respondent, for more than one year before the filing of said petition, has resided at Thirty-first and Thompson streets, in the city of Philadelphia.

74 3. That it is true the said partners, R. Vollmer and A. Born, are indebted to the said Blackburne, the complainant, but the precise sum he is unable to state, because he did not keep the partnership books, but he is instructed by his counsel that the said claim is not provable against said partners, under the provisions of the act of Congress of the 2nd of March, 1867, against said Vollmer and Born, so that they can be declared bankrupts. He is unable to state the exact amount of the indebtedness of said partners, but does not admit that it exceeds the sum of fifteen thousand dollars.

4. That it is true that the said R. Vollmer and A. Born, as partners, are indebted to the said complainant. As this respondent did not keep the books nor conduct the financial affairs of said partnership business, he is unable to state the amount definitely, but believes that it amounts to near the sum of four thousand dollars and more, and believes that the sum is $4,726; that said debt is now due.

75 5. And this respondent denies that, within six months next preceding the date of said petition, the said Vollmer and this respondent, as copartners, did commit an act of bankruptcy, within the meaning of said act.

That it is true, in the month of January last, the said partners, by this respondent, *copartners*, sold fifty or empty casks, which would hold about nine hundred and ninety-four barrels of beer or other liquids, for the price and sum of seventeen hundred and five dollars, which, at the time of said sale, was the full and clear value of the same, and they were not worth more than that sum, the price paid for them.

And denies that they were worth the sum of twenty-nine hundred dollars, as charged in the petition of said complainant; and this respondent denies that said sale was made with the intent to defraud their creditors, but the said sale was made in the regular course of business, for a

76 fair price, and with no intention whatever of defrauding their creditors; and he denies that the said proceeds of sale were given to some of their creditors with the intent to prefer any creditors; that at their brewery the said partners were indebted largely to their workmen; that this respondent conducted the manufacturing of the beer at that place, 31 Thompson street. The said Vollmer sold the beer down in the city and received the money, but did not send to this respondent the money to pay workmen who were there engaged; and, for the purpose of paying the hands and workmen there employed, this respondent was compelled to raise the money in some way; the said Vollmer having retained the money received from the sales of the beer; this respondent having no other means to obtain the money than by selling some of the personal property of the firm, which they were not using, and not wanted at the factory, being empty casks, and adopted that course. But in so doing this respondent denies that he intended to prefer any creditor or these workmen, but to pay their monthly, weekly, or daily

wages, which were due them, in the regular course of their said
77 business. Nor were said partners insolvent, as he believed.

6. And this respondent, further answering, says that it is true there was sold by him, to J. & P. Beilt, on or about the 18th day of January, 1868, two or more fermenting-tubs, which were not then used, nor necessary in their business of the brewing of beer. The firm being honestly indebted to said J. & P. Baltz, in the sum of about six hundred dollars, the said articles were sold to them as payment of their said debt. But this respondent denies that the said sale was made with any design or intention of giving to them a preference in the payment of their debts over any other creditors of said firm, nor with an intent to hinder or delay any other creditors of the said firm in the payment of their debts. Nor did this respondent when said sale was made known or believe that the said firm was insolvent.

That the said Vollmer was the book-keeper of their said partnership-
business, and conducted as well as managed the entire financial
78 business of said firm, and the affairs of said partnership, while this respondent attended to the manufacturing part of their business at their factory, Thirty-first and Thompson street, and hence he knew nothing of the financial affairs of the firm, but trusted the whole management of that portion of their business to his copartner, R. Vollmer. When money was sent to him at the factory, he paid the hands and workmen, or creditors as they came, and if he had not the money on hand he paid them as best he could, by the sale of any property which the firm could well part with; but not with the view or intention of preferring any creditor or creditors, wishing to pay every one what was justly their due, fully and honestly believing, when such payments were made, the firm were perfectly solvent, and able to pay all *all* their debts.

7. And this respondent, further answering, says that it is true that, on or about the third of January last, the said copartner of R. Vollmer & Co., Born, was the owner of considerable personal prop-
79 erty, but he does not admit that it was of the value of eight thousand dollars, nor is he able to state what was the cash value of the same. Among said articles of property were some casks and fermenting-tubs, and some horses and wagons. A part of said property was sold, and part still remains unsold. This respondent admits that he sold to Conrad Smith twenty-two casks, for the sum of four hundred and forty-two dollars,
nor that said casks were made to prefer those creditors. That he sold to said Reinhold some of said property, to the amount of three hund. and six dollars.

That the said firm owed to G. Hopple a debt of one thousand dollars, and he sold to him, in payment of said debt, five fermenting-tubs, some casks, and one wagon. Said Hopple had issued an execution, and had levied upon the property of said firm, and for the purpose of avoiding a sale by the sheriff, and a sacrifice of the same, he sold them to said
Hopple, the execution-creditor, who agreed to take the said ar-
80 ticles of property in payment of his debt, which was justly due; but when said sale was so made, it was not done with the intention of preferring said creditor, but to avoid a sacrifice of the property of the firm by a sheriff's sale.

All the horses, and other wagons, and the residue of the property remains unsold, and *is* in the possession of the said partners. But before the petition of said Blackburne had been filed, to which this answer is now made, all of said property had been leased and taken in execution by the sheriff of Philadelphia, and is held by that officer under said levy.

And this respondent denies that when said sales were made the proceeds thereof have been appropriated in violation of the act of Congress, or that any of said property was sold or payment made with the intent of preferring any of the creditors of said firm, or with the intent of hindering or delaying any creditors the said complainant.

81 And this respondent answering, says that it is true that John Klump had given an accommodation note for the benefit of said firm, and it was endorsed by respondent individually. The note was for the sum of nine hundred and fifty dollars, ($950.) The note was discounted by the bank, and the firm obtained the money on it. When the note matured the said firm did not pay it, and to a protest. Said Kleim paid the same, and called upon this respondent for the money, but he not having it at the time, said Klump proposed that he would take a quantity of hops, which the partners had on hand, in payment, and they were sold to him in payment of the note, and the debt cancelled, but not with the intent to give a preference to said Klump. And this respondent denies that, on the fourth day of January, 1868, the said partners fraudulently stopped payment of their commercial paper, and have not resumed payment within the period of fourteen days, but, on the contrary, have paid some of their commercial paper since the said fourth day of January, 1868, and debts of the firm. This respondent is not aware said firm had given much commercial paper, as he rarely gave any note of the said firm, as nearly all

82 of the financial business was conducted by said Vollmer. This respondent has been informed that said Vollmer, in violation of their partnership obligations, has given to others accommodation notes. To prevent his so doing, he had filed a bill in equity in the supreme court to January T, 1868, No. 48, for the purpose of obtaining a dissolution of said partnership, and is prosecuting the same with a view of effecting that object, and also has applied for an injunction. And this respondent denies that he has done any act or thing whereby he should be declared a bankrupt, or which authorizes the issuing of a warrant to take the possession of his individual property or of his interest in the partnership property of the firm of R. Vollmer and A. Born; wherefore he prays that he may be dismissed from said court without delay.

AUG. BORN.

August Born, being duly sworn according to law, doth declare and say that the matters and things stated in the above answer, of his own knowledge, are true, and those stated on the information of others, he believes to be true.

83 AUG. BORN.

Sworn & subscribed before me, this 6th day of February, 1868.
CHARLES SERGEANT,
U. S. Commissioner.

84 In the district court of the United States for the eastern district of Pennsylvania.

IN THE MATTER OF REINHOLD VOLLMER, a bankrupt.

We, Francis Blackburne and Martin I. Croll, are jointly and severally bound to B. Franklin Fisher, esquire, register in bankruptcy, in

one hundred and fifty dollars, conditioned that if the said petitioning creditor shall, in addition to his deposit of fifty dollars, which has been made under the 47th section of the act of 2 March, 1867, pay all accruing fees, costs, and charges, until the assignee shall be in funds to reimburse or pay the same, this obligation shall be void; otherwise it shall continue in force. Witness our hands and seals, this eighth day of February, A. D. 1868.

FRANCIS BLACKBURNE, JR. [SEAL.]
MARTIN I. CROLL. [SEAL.]

Witness:
J. MASON.

85 In the district court of the United States for the eastern district of Pennsylvania.

IN THE MATTER OF REINHOLD VOLLMER and August Born, copartners, trading under the name of R. Vollmer and A. Born, against whom a petition has been filed for adjudication in bankruptcy. } In bankruptcy.

And now, February thirteenth, A. D. 1868, the petitioner, Francis Blackburne, jr., by leave of the court, amends his petition, as follows, and charges:

That, within six calendar months next preceding the date of the said petition, and within said district, to wit, on the eighteenth day of January, A. D. 1868, the said copartnership of R. Vollmer and A. Born, then being indebted, in the sum of six hundred dollars, to I. & P. Baltz, creditors of the said copartnership, the said August Born, one of the said copartners, in contemplation of the insolvency of the said copartnership of R. Vollmer and A. Born, did give, transfer, and
86 sell two or more fermenting-tubs to their said creditors, I. and P. Baltz, as and for and in payment of the said indebtedness, and with intent to give a preference to the said I. & P. Baltz; and with intent, by such disposition of the said copartnership property, to defeat or delay the operation of the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867.

FRANCIS BLACKBURNE, JR.

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, ss:

I, Francis Blackburne, jr., the petitioner above named, do hereby make oath that the statements contained in the foregoing amendment to my petition by me subscribed are true, so far as the same are stated of my own knowledge, and that those matters which are stated therein on information and belief are true, according to the best of my knowledge, information, and belief.

FRANCIS BLACKBURNE, JR.

Sworn and subscribed before me this 13th day of February, A. D. 1868.

BENJ. PATTON,
U. S. Commissioner.

87 IN THE MATTER OF THE PETITION OF Francis Blackburne, jr., *vs.* AUGUST BORN. } U. S. district court. In bankruptcy.

The counsel for August Born move for a rule to shew cause why a new trial should not be granted, and files the following reasons:

1st. Because the learned judge erred in charging the jury that *under* the facts disclosed and referred to in the charge as to the payment of the note to John Klump w*as* sufficient in law to support the allegation of the petitioning creditor on the fourth issue joined by the parties.

2nd. Because the construction given to the bankrupt act of *of* the 2nd March, 1867, by the learned judge, as applied to the fourth issue, was erroneous.

3rd. Because the learned judge erred in not instructing the jury that, even if they found the facts true, as indicated by the fourth issue, they were not sufficient to render said August Born an involuntar*ily* bankrupt.

A. V. PARSONS,
Def't's Att'y.

88 No. 63. Manual as approved.]

Adjudication of bankruptcy on creditor's petition.

In the district court of the United States for the eastern district of Pennsylvania.

IN THE MATTER OF AUGUST BORN, AGAINST whom a petition in bankruptcy was filed on the 31st day of January, A. D. 1868. } In bankruptcy.

At Philadelphia, in said district, on the 26th day of February, A. D. 1868, before Hon. John Cadwalader, judge of the district court of the U. S. for the eastern district of Pennsylvania.

EASTERN DISTRICT OF PENNSYLVANIA, *ss:*

This matter came on to be heard at Philadelphia in said court, and* the said August Born having, on the return day of the order to shew cause, appeared and denied that he had committed the acts of bankruptcy alleged in said petition, and demanded that this might be inquired of by a jury; and afterwards, to wit, on the 20th day of February, A. D. 1868, a jury, duly empanelled, having found that he had committed the acts of bankruptcy alleged, judgment is entered on their verdict.

89 And thereupon, and upon consideration of the proofs in said matter,*† it was found that the facts set forth in said petition were true; and it is therefore adjudged that August Born became bankrupt within the true intent and meaning of the act entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867, before the filing of the said petition, and he is therefore declared and adjudged a bankrupt accordingly. And it is further ordered, that the said bankrupt shall, within five days after the

* After the * state what proceedings were had; whether there was or was not opposition; whether and what counsel appeared for the parties, &c.

† After the * insert "and the arguments of counsel thereon," if counsel were heard.

date of this order, make and deliver, or transmit by mail, post-paid, to the marshal, as messenger, a schedule of his creditors, and inventory of his estate, in the form and verified in the manner required of the petitioning debtor by the said act.

And it is further ordered that, for such purposes of the adjudication and warrant as may require the intervention of a reg., the case be referred to B. Franklin Fisher, esq., register.

Witness the Hon. John Cadwalader, judge of said district court, and the seal thereof, at Philadelphia, in said district, on the twenty-sixth day of February, A. D. 1868.

[L. S. OF THE COURT.]

G. R. FOX,
Clerk of District Court for said District.

(Indorsed:) Docket, case No. , page . District court of the United States, district of . In bankruptcy. In the matter of , bankrupt. Adjudication of bankruptcy. (On creditor's petition.) Entered this 26 day of Feb'y, A. D. 1868. , clerk of district court for said district.

90 *Certified abstracts of proceedings under section 4.*

In the district court of the United States for the eastern district of Pennsylvania. In bankruptcy.

IN THE MATTER OF REINHOLD VOLLMER, BANKRUPT.

At 117 South Fourth (4th st.,) Philadelphia, in said district, on the 12th day of March, A. D. 1868, before B. Franklin Fisher, esq., a register in bankruptcy of said district.

EASTERN DISTRICT OF PENNSYLVANIA, *ss:*

MEMORANDUM.

This day attended first meeting of creditors of Reinhold Vollmer, the above-named bankrupt, at said Philadelphia, where the marshal made return of the warrant, setting forth under oath, that he *he* has caused the publication to be made and notices to be served as required. Personally came Peter Johannes, Francis Blackburne, jr., Massey Huston & Co., by William Massey, and made proof of claim.

91 Charles W. Foultney filed his proof of claim. The meeting was then adjourned to March 18, 1868, at 11 o'clock a. m., when the warrant in the case of August Born, a partner of the said Reinhold Vollmer, is returnable.

To all of which I hereby certify on the day and date, and at the place first aforesaid.

B. FRANKLIN FISHER,
Register in Bankruptcy for the District aforesaid.

Failure of choice of assignee.—Certified memorandum of first meeting of creditors.

In the district court of the United States for the eastern district of Pennsylvania. In bankruptcy.

IN THE MATTER OF REINHOLD VOLLMER AND August Born, trading as R. Vollmer and A. Born, bankrupts.

At 117 South Fourth st., Philadelphia, in said district, on the

92 eighteenth day of March, A. D. 1868, before B. Franklin Fisher, esq., register in bankruptcy.

EASTERN DISTRICT OF PENNSYLVANIA, *ss:*

MEMORANDUM.

This being the day appointed by the court for the first meeting of creditors, under the bankruptcy of August Born, whereof the notice required in that behalf has been duly given, and the day appointed for the adjourned first meeting of creditors of Reinhold Vollmer, a copartner of the said August Born, trading under the firm-name of R. Vollmer & A. Born, it being ordered by the register, the creditors and parties assenting, that the proceedings in bankruptcy be united and conducted as one case, I, the undersigned B. Franklin Fisher, register of the said court in bankruptcy, sat at the time and place above mentioned, pursuant to such notice, to take the proof of debts, and for the choice of assignee under the said bankruptcy; and I hereby certify that the greater part in number and in value of the creditors who have proved their debts were present, or were duly represented, and failed at an election held
93 day to choose an assignee. Therefore, the undersigned register appointed Samuel V. Mays, esq., of the city and county of Philadelphia, assignee of the estate of R. Vollmer and A. Born, and of the separate estate' of Reinhold Vollmer and August Born, individual members of said firm.

The register suggests that the assignee be required to give security in the amount of twenty thousand dollars.

I accept the within trust.

SAMUEL V. MAYS.

I hereby certify to the foregoing proceedings, as had before me, on the day and date first above mentioned.

B. FRANKLIN FISHER,
Register in Bankruptcy for said District.

To G. R. FOX,
Clerk of said District Court of U. S.

94 In the district court of the United States for the eastern district of Pennsylvania. In bankruptcy.

At Philadelphia, in said district, on the 18th day of March, A. D. 1868, before B. Franklin Fisher, esquire, register in bankruptcy.

EASTERN DISTRICT OF PENNSYLVANIA, *ss:*

MEMORANDUM.

I hereby certify that the following is a list of creditors who have this day, at the first meeting thereof, before me, duly proved their debts against the estate of Reinhold Vollmer and August Born, of Philadelphia, in the county of Philadelphia, in said district, bankrupt' aforesaid:

Name of creditors.	Residence.	Debts proved.
Christian D. Irick	Philadelphia	4,810 44
Herman Weigman	Philadelphia	394 74
G. Heilman & Co.	Philadelphia	55 84
O. E. Schader	Philadelphia	80 63
Joseph Bonnewitz	Philadelphia	379 97
John Dickman	Philadelphia	200 00

B. FRANKLIN FISHER,
Register.

95 *Assignment of bankrupts' effects.*

In the district court of the United States for the eastern district of Pennsylvania.

IN THE MATTER OF REINHOLD VOLLMER & August Born, trading as R. Vollmer & A. Born, bankrupts. } In bankruptcy.

EASTERN DISTRICT OF PENNSYLVANIA, *ss:*

Know all men by these presents that Samuel Mays, of the city and county of Philadelphia, and State of Pennsylvania, has been duly appointed assignee of the estate of R. Vollmer and A. Born, and of the separate estate of Reinhold Vollmer and August Born, individual members of said firm of R. Vollmer & A. Born, of Philadelphia, in the county of Philadelphia and State of Pennsylvania, who have been adjudged bankrupts by the decree of this court:

Now, therefore, I, B. Franklin Fisher, register in bankruptcy for said district, by virtue of the authority vested in me by the four-
96 teenth section of the act of Congress, entitled an act 'o establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867, do hereby convey & assign to the said Samuel V. Mays, assignee, as aforesaid, all the estate, real and personal, of the said firm of R. Vollmer and A. Born, and also all the separate estate, real & personal, of said Reinhold Vollmer and August Born, individual members of the said firm, bankrupts, including all property of whatever kind of which the said firm or the said individual members thereof are possessed, or in which the said firm or the said individual members were interested or entitled to have on the thirty-first day of January, A. D. one thousand eight hundred and sixty-eight, together with all their deeds, books, and papers, relating thereto, saving & excepting such property as is excepted from the operation of this assignment by the provisions of said fourteenth section of said act. To have and to hold all the foregoing premises to the said Samuel V. Mays and to his heirs forever.

97 In trust, nevertheless, for the use and purposes, and with the powers, and subject to the conditions and limitations prescribed and set forth in said act.

In witness whereof I, B. Franklin Fisher, register in bankruptcy of said district, have hereunto set my hand and caused the seal of said district court to be affixed, this eighteenth day of March, anno Domini one thousand eight hundred and sixty-eight.

[SEAL OF THE COURT.] B. FRANKLIN FISHER,
Register in Bankruptcy.

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98 *Assignment of bankrupt effects.*

In the district court of the United States for the eastern district of Pennsylvania.

IN THE MATTER OF REINHOLD VOLLMER AND August Born, trading as R. Vollmer and A. Born, bankrupts. } In bankruptcy.

EASTERN DISTRICT OF PENNSYLVANIA:

Know all men by these presents that Samuel V. Mays and Charles W. Horner, of the city and county of Philadelphia, and State of Pennsyl-

vania, have been duly appointed assignees of the estate of R. Vollmer and A. Born, and of the separate estate of Reinhold Vollmer and August Born, individual members of said firm of R. Vollmer and A. Born, of Philadelphia, in the county of Philadelphia, and State of Pennsylvania, who have been adjudged bankrupts by decree of this court.

Now, therefore, I, B. Franklin Fisher, register in bankruptcy
99 for said district, by virtue of the authority vested in me by the fourteenth section of the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867, do hereby convey and assign to the said Samuel V. Mays and Charles W. Horner, assignees as aforesaid, all the estate, real and personal, of the said firm of R. Vollmer and A. Born, and also all the separate estate, real and personal, of the said Reinhold Vollmer and August Born, individual members of the said firm, bankrupts, including all property, of whatever kind, of which the said firm or the said individual members thereof are possessed, or in which the said firm or the said individual members were interested or entitled to have, on the thirty-first day of January, A. D. one thousand eight hundred and sixty-eight, together with all their deeds, books, and papers, relating thereto, saving and excepting such property as is exempted from the operation of this assignment by the provisions of said fourteenth section of said act.

100 To have and to hold all the foregoing premises, to the said Samuel V. Mays, and Charles W. Horner, and to their heirs forever.

In trust nevertheless for the use and purposes, and with the powers, and subject to the conditions and limitations prescribed and set forth in said act.

In witness whereof I, B. Franklin Fisher, register in bankruptcy of said district, have hereunto set my hand and caused the seal of said court to be affixed this thirtieth day of March, in the year of our Lord one thousand eight hundred and sixty-eight.

[SEAL OF THE COURT.] B. FRANKLIN FISHER,
Register in Bankruptcy.

101 *Bond of assignee.*

In the district court of the United States for the eastern district of Pennsylvania.

IN THE MATTER OF REINHOLD VOLLMER AND August Born, trading as R. Vollmer & A. Born. } In bankruptcy.

[U. S. int. rev. stamp.]

EASTERN DISTRICT OF PENNSYLVANIA, *ss:*

Know all men by these presents that we, Charles W. Horner, of Philadelphia, and Benjamin Coates, of Philadelphia, are held and firmly bound unto the United States of America, in the just & full sum of five thousand dollars, to the payment whereof, well and truly to be made, we do bind ourselves, our, and each of our heirs, executors, and administrators, sealed with our seals, and dated this thirtieth day of March, anno Domini one thousand eight hundred and sixty-eight.

The said Charles W. Horner, in connection with Samuel V.
102 Mays, having been, on the twenty-eighth day of March, A. D. 1868, by order of the district court of the United States for the

eastern district of Pennsylvania, appointed assignees in bankruptcy of the estate of Reinhold Vollmer and August Born, trading as R. Vollmer and A. Born, of Philadelphia, in the county of Philadelphia, in said district, bankrupts, this bond is executed pursuant to the thirteenth section of the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States, approved March 2, 1867," and is conditioned for the due and faithful discharge of all his duties by the said Charles W. Horner, as such assignee, and in compliance with the orders and directions of the court in the matter of bankruptcy of the said Reinhold Vollmer and August Born, trading as R. Vollmer and A. Born.

In witness whereof, we have hereunto respectively subscribed our names and affixed our seals, the thirtieth day of March, in the year of our Lord one thousand eight hundred and sixty-eight.

CHARLES W. HORNER. [SEAL.]
BENJ. COATES. [SEAL.]

103 Sealed and delivered and taken and acknowledged, this thirtieth day of March, anno Domini one thousand eight hundred and sixty-eight.

Justification.

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, ss:

Benjamin Coates, being duly affirmed, says that he resides at 1616 Arch street, Philadelphia, and that he is worth the sum of ten thousand dollars over and above all his just debts and liabilities.

BENJ. COATES.

Sworn before me this 30th day of March, A. D. 1868.

B. FRANKLIN FISHER,
Register in Bankruptcy.

Approval.

I approve the above bond and the sufficiency of the sureties thereto. Dated 30th day of March, A. D. 1868.

B. FRANKLIN FISHER,
Register in Bankruptcy.

104 *Bond of assignee.*

In the district court of the United States for the eastern district of Pennsylvania.

IN THE MATTER OF REINHOLD VOLLMER & August Born, trading as R. Vollmer and A. Born, bankrupts. } In bankruptcy.

[U. S. int. rev. stamp.]

EASTERN DISTRICT OF PENNSYLVANIA, *ss:*

Know all men by these presents that we, Samuel V. Mays, of Philadelphia, Ernst Conrad Sopp, of Philadelphia, and I. David Miller, of

Philadelphia, are held and firmly bound unto the United States of America in the just and full sum of five thousand dollars, to the payment whereof, well and truly to be made, we do bind ourselves, our and each of our heirs, executors, and administrators, sealed with our seals and dated this thirty-first day of March, anno Domini one thousand eight hundred and sixty-eight.

The said Samuel V. Mays having been, on the thirtieth day of March, A. D. , by order of the district court of the United
105 States for the eastern district of Pennsylvania, appointed assignee in bankruptcy, of the estate of Reinhold Vollmer and August Born, trading as R. Vollmer and A Born, of Philadelphia, in the county of Philadelphia, in said district, bankrupts, this bond is executed pursuant to the thirteenth section of the act of Congress, entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867, and is conditioned for the due and faithful discharge of all his duties by the said Samuel V. Mays, as such assignee, and in compliance with the orders and directions of the court, in the matter of bankruptcy of the said Reinhold Vollmer & August Born, trading as R. Vollmer and A. Born.

In witness whereof we have hereunto respectively subscribed our names and affixed our seals, the thirty-first day of March, in the year of our Lord one thousand eight hundred and sixty-eight.

SAMUEL V. MAYS. [SEAL.]
E. C. SOPP. [SEAL.]
I. DAVID MILLER. [SEAL.]

106 Sealed and delivered and taken and acknowledged, this thirty-first day of March, anno Domini one thousand eight hundred and sixty-eight, before me—

B. FRANKLIN FISHER,
Register in Bankruptcy.

Justification.

UNITED STATES OF AMERICA,
Eastern District of Penn'a, ss:

Ernest Conrad Sopp, being duly sworn, says that he resides at 158 North Sixth street, Philadelphia, and that he is worth the sum of four thousand dollars over and above all his just debts and liabilities.

Sworn before me this 31st day of March, A. D. 1868.

B. FRANKLIN FISHER,
Register in Bankruptcy.

Justification.

UNITED STATES OF AMERICA,
Eastern District of Penn'a, ss:

I. David Miller, being duly sworn, says that he resides at 1610 Valeria st., Philadelphia, and that he is worth the sum of twenty-
107 five hundred dollars over and above all his just debts and liabilities.

I. DAVID MILLER.

Sworn before me this 31st day of March, A. D. 1868.

B. FRANKLIN FISHER,
Register in Bankruptcy.

Approval.

I approve the above bond and the sufficiency of the sureties thereto. Dated 31st day of March, A. D. 1868.

B. FRANKLIN FISHER,
Register in Bankruptcy.

108 *Certificate of exempted property.*

In the district court of the United States for the eastern district of Pennsylvania.

IN THE MATTER OF AUGUST BORN, OF THE firm of Vollmer & Born, bankrupts. } In bankruptcy.

At Philadelphia, in said district, this 30th day of July, A. D. 1868.

EASTERN DISTRICT OF PENNSYLVANIA, *ss:*

The following is a schedule of property, designated and set apart, to be retained by the bankrupt aforesaid, as his own property, under the provisions of the 14th section of the act of Congress, entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867:

List of property.	Particular description.	Appraised value.
Necessary household and kitchen furniture not exceeding $500 in value.		
Wearing apparel of bankrupt and his family.		
Equipments, if any, as a soldier.		
Other property exempted by laws of the United States.		
Property exempted by State laws to the value of $300, as follows:		
Kitchen furniture, table, chairs, and crockery		$15 00
One set of chamber furniture, very common		10 00
Two beds & bedding, walnut & spring mattresses		80 00
109 Six chairs	Cane seats	6 00
Carpet		20 00
Looking-glass		2 00
Wash-stand		2 00
One bed & bedding		4 00
3 chairs & stand		2 00
Stove		1 50
One bureau		10 00
Six chairs	Cane seats	6 00
Rocking-chair		2 00
Parlor carpet		50 00
One looking-glass	Large pier-glass	75 00
Rocking-chair	Stuffed	7 00
		$300 50
The following is set apart under the provisions of the 14th section of the bankrupt act of March 2, 1867:		
Two sofas		30 00
Carpet		15 00
Six chairs @ 3	Stuffed walnut	18 00
1 whatnot		5 00
		68 00
Value of all property set aside		368 00

Given this day and date first aforesaid.

SAM'L V. MAYS,
CHARLES W. HORNER,
Assignees, &c.

Approved.

B. FRANKLIN FISHER,
Register in Bankruptcy.

110 *Certificate of exempted property.*

In the district court of the United States for the eastern district of Pennsylvania.

IN THE MATTER OF REINHOLD VOLLMER, OF THE firm of Vollmer & Born, bankrupts. } In bankruptcy.

At Philadelphia, in said district, this 30th day of July, A. D. 1868.

EASTERN DISTRICT OF PENNSYLVANIA, *ss :*

The following is a schedule of the property designated and set apart to be retained by the bankrupt aforesaid, as his own property, under the provisions of the 14 section of the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867 :

List of property.	Particular description.	Appraised value.
Necessary household and kitchen furniture not exceeding $500 in value.		
Other articles & necessaries		
Wearing apparel of bankrupt and his family.		
Equipments, if any, as a soldier,		
Other property exempted by laws of the United States.		
Property exempted by State laws, to the value of 300 as follows:		
Kitchen furniture		25 00
2 bed-teads & bedding		20 00
Chamber carpet		15 00
Bureau		3 00
111 Wash-stand		2 00
3 chairs		10 00
Clock		3 00
Looking-glass		50
Six chairs		12 00
Sofa		15 00
Piano-stool		3 00
Table		2 50
Blinds		2 00
Looking-glass		2 00
Lot of pictures		1 75
Carpet		10 00
Bed & bedding		10 00
Chamber carpet		3 50
Wash-stand		10 00
Curtain		1 00
2 chairs @ 1		2 00
Hat rack & stand		2 00
Whole value of prop. set aside		$155 25

Given the day and date aforesaid.

SAM'L V. MAYS,
CHARLES W. HORNER,
Assignees, &c.

Approved.

B. FRANKLIN FISHER,
Register in Bankruptcy.

112 In the district court of the United States for the eastern district of Pennsylvania.

IN THE MATTER OF REINHOLD VOLLMER & August Born, late trading as R. Vollmer & A. Born, bankrupts. } In bankruptcy.

To the Hon. John Cadwalader, judge of the district court for said district.

The assignees of the above-named bankrupts respectfully represent that they have received nine hundred dollars belonging to the estate

of said bankrupts; that there are suits pending for the recovery of other monies due said estate, and they therefore petition the court for an order for the temporary investment or deposit of said nine hundred dollars, until distribution can be made in accordance with the 17th section of the bankrupt act.

SAM'L V. MAYS,
For Sam'l V. Mays & Cha's W. Horner, Assignees.

113 (Endorsed:) Ordered, that the assignees may make the investment prayed, by depositing the money at interest with the Pennsylvania Company for insurances in lives and granting annuities. Filed Dec. 5, 1868, at 10 o'c.—1.

114 *Order for examination of bankrupt or his wife.*

In the district court of the United States for the eastern district of Pennsylvania.

IN THE MATTER OF REINHOLD VOLLMER & August Born, late trading as Vollmer & Born, bankrupts. } In bankruptcy.

EASTERN DISTRICT OF PENNSYLVANIA, *ss:*

On the application of Samuel V. Mays & Cha's W. Horner, assignees of said bankrupts, of Philadelphia, in the county of Philadelphia, and State of Pennsylvania, a party claiming to be interested in the estate of the said Vollmer & Born, bankrupts, and* in order to ascertain the title of certain personal property formerly belonging to the said Vollmer, and also the conditions of the affairs of both bankrupts in general, it is ordered that †Reinhold Vollmer, said bankrupt, be and attend before ‡B. Franklin Fisher, a register in bankruptcy of this court, at the office of the said register, at No. 119 South Fourth street, Philadelphia, in said district, on the 27th day of October, A. D. 1868, at three o'clock m., to submit to the examination required by the 26th section of the act entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867, and that a copy of this order be served on him, the said Reinhold Vollmer, forthwith, by , by delivering the same to him, or by leaving the same at his last usual place of abode.

115 Witness the Hon. John Cadwalader, judge of the said district court, and the seal thereof, at Philadelphia, in said district, on the twenty-second day of October, A. D. 1868.

[L. S. OF THE COURT.] G. R. FOX,
Clerk of District Court for said District, C. E. C.

Affidavit of servive of foregoing order.

UNITED STATES OF AMERICA,
District of , *ss:*

I, , hereby make that I duly served a copy of the foregoing order on , the person therein

* After the * insert statement of any matter presented in support of the application.
† After the † insert the name of the bankrupt or his wife.
‡ After the ‡ insert the court or name of the register before whom the examination is to take place.

named, on , the day of , A. D. 18 , by*

Subscribed and to before me, this day of , A. D. 18 .

(Indorsed:) Docket case No. , page . District court of the United States, district of . In bankruptcy. In the matter of , bankrupt. Order for examination of bankrupt or of his wife. Entered this day of , A. D. 18 . , clerk of district court for said district. [Entered according to act of Congress, in the year 1867, by Philp & Solomons, in the clerk's office of the supreme court of the District of Columbia.]

116 In the district court of the United States for the eastern district of Pennsylvania.

IN THE MATTER OF REINHOLD VOLLMER and August Born, copartners, involuntary. } In bankruptcy. No. 363.

Geo. W. Thorn, solicitor for petitioner.

1868. Jan. 31. Petition of Francis Blackburne, jr., that Reinhold Vollmer and August Born, copartners as R. Vollmer and A. Born, be declared bankrupts. Filed.

" " Deposition' as to petitioning creditor's claim and act of bankruptcy filed.

" " Order to shew cause. Ret'ble, Feb. 7, 1868, 10 a. m.

Feb. 7. Affidavit of service of order to shew cause filed. Demand for jury trial by August Born filed, who appears in person.

Adjudication of bankruptcy as to Reinhold Vollmer, who makes default in appearance, and warrant to take possession of his estate issued, and case referred to B. Franklin Fisher, esq., as register.

Answer of August Born filed.

" 8. Bond as to costs, &c., filed.

" 17. Amendment to creditor's petition filed and allowed.

117 1868. Feb. 20. And now, a jury being called, came, to wit, DeWitt C. , George A. Lewis, James M. Barton, Isaac Cooper, Frank R. Faust, George F. Gordon, James K. Kerr, Abraham Baker, Edward White, Charles B. Baeder Stephen P. M. Tasker, and Michael F. Dougherty, who are respectively sworn or affirmed to inquire whether the alleged bankrupt committed the acts of bankruptcy alleged and set forth in the petition of the said Francis Blackburne, jr., or any of the said alleged acts, say that they find for the petitioning, and, being thereupon asked whether the alleged bankrupt, August Born, trading with Reinhold Vollmer as R. Vollmer and A. Born, did, within six months next preceding the thirty-first day of January, A. D. 1868, in contemplation of bankruptcy or insolvency, sell and transfer certain

*After the * add whether service was made personally, or by leaving the same at the last and usual place of abode, or where.

merchandise, to wit, hops, to John Clump, to secure and prefer him as the maker of an accommodation note in favor of the said R. Vollmer and A. Born, with intent to give him a preference, say that he did.

Whereupon, the said verdict having been received
118 and recorded, the jurors are, by consent, discharged from further inquiry as to the other alleged acts of bankruptcy.

1868. Feb. 20. A. V. Parsons, esq., counsel for August Born, moves for a rule to shew cause why a new trial should not be granted. Reasons filed.

" " 26. Rule to shew cause dismissed. Adjudication of bankruptcy, reference to Register Fisher, and warrant issued.

" Mar. 23. Appointment of assignee approved on giving security in $20,000, and assignment filed.

" " 28. George W. Thorn and H. R. Warriner, esq'r's, attorneys for creditors, moves the court for a modification of the order directing the assignee to enter security in the sum of $20,000, so that he may be permitted to enter the same in the sum of five thousand dollars, to remain until the further order of the court in the premises. Whereupon the court, upon due consideration, rescind the order appointing Sam'l V. Mays assignee, and directing him to give security in $20,000, and appoint him and Charles W. Horner, esq., assignees, and order said assignees to give security in the sum of five thousand dollars each.

119 " " 30. Assignment to Samuel V. Mays and Charles
1868. Mar. 30. W. Horner filed.

" April 9. Bond of Sam'l V. Mays and of Charles W. Horner, assignees, filed.

" July 31. Certificate of exempted property of the respective bankrupts filed.

" Oct. 22. Order for examination of Reinhold Vollmer filed.

" Dec. 5. On petition filed of this date, it is ordered that the assignees may make the investment prayed by depositing the money at interest with the Pennsylvania company for insurances on lives and granting annuities.

120 *Memoranda of proceedings before register.*

1868. Feb. 17. Warrant attested. Ret'ble Mar. 12, 1868.

" Mar. 2. List of creditors, and inventory of estate of August Born made by marshall. Warrant attested and issued, ret'ble Mar 18, 1868, 11 a. m.

" 12. First meeting of creditors of Reinhold Vollmer. Return of due service of warrant. For creditors who proved debts, see memorandum filed. Adjournment to Mar. 18, 1868, 11 a. m., when the warrant in the case of August Born, a partner of the said Reinhold Vollmer, is returnable.

" 18. First meeting of creditors of August Born, and adjourned first meeting of creditors of Reinhold Vollmer; it being ordered by the register, the creditors and parties assenting, that the proceedings be united and con-

ducted as one case; due notice having been given, and there being a failure to make choice of assignee, the register appointed Sam'l V. Mays, esq., of Philadelphia, assignee, and suggests that security in the sum of $20,000 be required. (For creditors who proved debts, see certified list filed.)

121 1868. Aug. 5. Examination of August Born. Present, Charles W. Horner and Sam'l V. Mays, esq., assignees. Examination adjourned to August 12, 1868, 3 p. m.

Aug. 12. Examination of August Born resumed. Present, Charles W. Horner and Sam'l V. Mays, assignees.

122 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, ss:

IN THE MATTER OF REINHOLD VOLLMER AND August Born, trading under the firm-name of R. Vollmer and A. Born.

I, Gilbert R. Fox, clerk of the district court of the United States for the eastern district of Pennsylvania, do hereby certify that the annexed and foregoing is a true and faithful copy of the proceedings in bankruptcy, in the matter of R. Vollmer and A. Born, and now remaining among the records of the said court in my office.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said district court, at Philadelphia, this sixteenth day of January, in the year of our Lord one thousand eight hundred and seventy-one, and in the ninety-fifth year of the Independence of the United States.

SEAL OF D. C. OF U. S.

G. R. FOX,
Clerk District Court U. S.
Per C. E. C.

(Indorsed:) U. S. district court. Certified copy.

123 EASTERN DISTRICT OF PENNSYLVANIA,
City and County of Philadelphia, ss:

The Commonwealth of Pennsylvania to the justices of the district court of the city and county of Philadelphia, greeting:

We being willing, for certain causes, to be certified of the appeal of Samuel V. Mays and Charles W. Horner, assignees of August Born, a bankrupt, from the decree of said court, confirming the report of the auditor in the cases of the American Insurance Company vs. A. Born, June T., 1868, No's 420–421, levari facias, before you, or some of you, do command you that the record and proceedings aforesaid, with all things touching the same, before the justices of the supreme court of Pennsylvania, at a supreme court to be holden at Philadelphia, in and for the eastern district, the first Monday of January next, so full and entire as in our court before you they remain, you certify and send, together with this writ, that we may further cause to be done thereupon, that which of right, and according to the laws of the said State, ought.

Witness the Hon. James Thompson, chief justice of our said supreme court, at Philadelphia, the sixth day of June, in the year of our Lord one thousand eight hundred and seventy-one.

J. ROBINSON,
[SEAL OF SUP. C'T OF P'A, E. D.] Pro J. ROSS SNOWDEN,
Prothonotary.

124 (Indorsed:) No. 118. July term, 1871. Supreme court. Appeal of Sam'l V. Mays & Charles W. Horner. Certiorari to the district court for the city and county of Philad'a. Returnable the first Monday of January, 1872. Rule on the appellee to appear and plead on the return day of the writ.

Record returned, Sep. 26, 1871.

To the honorable the judges within named, the record and proceedings within mentioned, and all things touching the same, we certify and send, together with this writ.

J. I. CLARK HARE. [L. S.]
JAMES LYND. [L. S.]

125 *Copy of docket-entries in supreme court of Pennsylvania, eastern district. From appearance docket, July term,* 1871. *P.* 669. *No.* 12.

Appeal of Samuel V. Mays & Charles W. Horner from decree of district court of the city & county of Philadelphia, confirming the report of the auditor, in cases No. 420–421, lev. fac. in said court.

Writ of certiorari to the district court of the city and county of Philadelphia, ret'ble first Monday January, A. D. 1872. Exit June 2, 1871. Eo die affidavit filed.

Sep. 26, 1871. Record returned and eo die assignments of error filed.
Feb. 15, 1872. Argued.
" 26, " Per curiam. This case is so well disposed of by the
126 Feb. 26, 1872. auditor in his report, it is unnecessary to say more
" " than that the judgment is affirmed.
28, 1872. On motion of A. V. Parsons, esq., rule granted to shew cause why a remittitur should not be issued in this case.
Ret'ble next Saturday, 2nd inst.
Sur notice of appeal to the Supreme Court of the United States, and notice not to make out a remittitur.
March 1, 1871. Argued sur rule to shew cause why a remittitur on the judgment given in this case should not be issued.
And now, March 2, 1872, rule discharged.
March 6, 1872. On motion of A. V. Parsons, esq., for def't in error, rule granted on pl'ff in error, to shew cause why the order, discharging rule on Saturday last, should not be rescinded, and the said rule made absolute. Mar. 9, '72. Rule discharged.
March 9, 1872. Writ of error from Sup. C't of U. S. to sup. c't of Penn'a, brought into office & filed, (with special allocutur by Justice Strong,) on Feb. 28, 1872. Endorsed. See writ. Eo die bond approved by Justice Strong. Filed.

127 I, James Ross Snowden, prothonotary of the supreme court in and for the eastern district of Pennsylvania, do hereby certify that the above and foregoing is a full, true, and correct copy of the record, proceedings and docket-entries in the within entitled case, so

full, whole, and entire, as the same are of record in the within-entitled case in my office.

Witness my hand and the seal of said supreme court at Philadelphia, this twenty-ninth day of October, A. D. 1872.

[SEAL.] JAMES ROSS SNOWDEN,
Prothonotary.

128 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, ss:

The President of the United States to the judges of the supreme court of Pennsylvania, in and for the eastern district of Pennsylvania, greeting:

Because, that, in the record and process, and also in the rendering of judgment in a suit before you or some of you, in the matter of the appeal of Samuel V. Mays and Charles W. Hornor, assignees of August Born, a bankrupt, from the decree of the district court of Philadelphia, confirming the report of the auditor, in the cases of the American Insurance Company vs. August Born, (June T., 1868, Nos. 420–421, lev. fa's,) wherein the said Mays and Hornor, assignees, are plaintiffs and appellants, and Mistress Fredericka Fritton, defendant and appellee, in a case of distribution of the proceeds of a sheriff's sale of real estate, a manifest error has intervened to the great damage of the said Samuel V. Mays and Charles W. Hornor, assignees as aforesaid, as in their complaint has been stated;

And as it just and proper that the error, if any there be, should be corrected in due manner, and that full and speedy justice should be done to the parties aforesaid in this behalf, you are hereby commanded that, if judgment thereof be given, then, under your seal, you do, distinctly and openly, send the record and process in the suit aforesaid, with all things concerning them, and this writ, so that you have the same before the Chief Justice and the associate justices of the Supreme Court of the United States, on the first Monday of December
129 next, at Washington, being the present seat of the National Government, that, the record and process aforesaid being inspected, they may cause to be done thereupon what of right ought to be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court, at Washington aforesaid, the first Monday of December, one thousand eight hundred and seventy-one, and of the Independence of the United States the ninety-sixth.

Issued 1st March, 1872.

[SEAL.] D. W. MIDDLETON,
Clerk Supreme Court U. S.

130 (Indorsed:) Supreme Court of the United States. Mays & Hornor, assignees of August Born, a bankrupt, vs. Mrs. Fredericka Fritton. Writ of error.

FEB. 28, 1872.—Writ allowed.

W. STRONG,
Asso. Jus. Supr. C. U. S.

Brought into office Mar. 9, 1872.

To the honorable the justices of the Supreme Court of the United States:

The response to this writ will be found in the certified copy of the record returned as herewith commanded.

Attest:

JAMES ROSS SNOWDEN, [SEAL.]
Prothonotary.

(Indorsement on cover:) No. 553. Samuel V. Mays and Charles W. Hornor, assignees of August Born, a bankrupt, plaintiffs in error, vs. Fredericka Fritton. Pennsylvania sup. court. Filed 5th December, 1872.

In the Supreme Court of the United States.

October Term, 1874.

SAMUEL V. MAYS AND CHARLES W. HORNOR, ASSIGNEES OF AUGUST BORN, A BANKRUPT,
PLAINTIFFS IN ERROR,
vs.
FREDERICKA FRITTON,
DEFENDANT IN ERROR.

No. 56.

Brief of Counsel for Plaintiffs in Error.

This is a writ of error of the said assignees from a decree of the supreme court of Pennsylvania rendered February 26, 1872, affirming the judgment of the district court for the city and county of Philadelphia. This latter judgment was the confirmation of an auditor's report, distributing the proceeds of a sale by the sheriff of the bankrupt's real estate under *levaris* obtained by the American Fire Insurance Company, on two mortgages.

ABSTRACT OF THE CASE.

The original proceedings here were *sci. fas.* on mortgages, issued April 29, 1868, followed by *lev. fas.*, under

which the real estate mortgaged was sold on July 6, 1868, for $26,500.

Record, page 20.

Out of the proceeds were paid by consent the claims of the plaintiff in the *sci. fas.*, (American Insurance Company;) as well as the claims of J. M. Hummell, and of a building company, (the good faith of these claims and their REAL liens not being contested,) leaving for distribution $5,192.65.

On January 16, 1868, August Born, the bankrupt, executed his warrant of attorney to A. V. Parsons, Esq., to enter judgment in favor of the former's mother-in-law, Mrs. Fritton, the defendant in error here, for $4,500, payable in one year from date, with lawful interest semi-annually. *Judgment was entered same day.*

Record, page 21, D. S. B., No. 355, D. T., 1867.
Also Rec., p. 6, near top.

After an interval of fifteen days, to wit, on January 31, 1868, Born was proceeded against as an involuntary bankrupt. He was defended by A. V. Parsons, Esq., and after a trial by jury, verdict, and an ineffectual motion for a new trial, Born was decreed a bankrupt on February 20, 1868, to date from 31st January, 1868.

Record, p. 21, *et seq.*

Edwin T. Chase was appointed auditor to make distribution September 22 of the proceeds of the sale *under the levaris.* Mrs. Fritton was represented by the same counsel that had defended Born in the bankrupt proceedings, and claimed out of the fund in court the entire amount of

the confessed judgment he had caused to be entered in her favor on January 16, 1868.

Record, pages 2 and 6, at top.

The assignees of Born resisted; and then Mrs. Fritton applied for an issue, (Record, pp. 3, 4,) which application was referred to the court *and granted* December 7, 1868. (Record, page 20.) The issues were prepared by the assignee's counsel, and approved by the court July 3, 1869, (Record, pp. 20, 21,) and are as follows:

Rec., p. 18.

First. Whether at the time the warrant of attorney, upon which judgment D, '67, 355 was entered, was given by the said August Born to the said Fredericka Fritton, he, the said August Born, was insolvent?

The jury found for the plaintiffs, the assignees.

Second. Whether at the time of the giving of said warrant of attorney, the said Fredericka Fritton had reasonable cause to believe that the said August Born was insolvent?

The jury found for the defendant, the creditor.

Third. Whether the said warrant of attorney was given by the said August Born to the said Fredericka Fritton to secure the payment of a prior debt?

The jury found for the plaintiff.

Fourth. Whether the said warrant of attorney was given to the said Fredericka Fritton as a preference over the other creditors of August Born?

The jury found for the defendant, the creditor.

Record, pages 18 and 19.

A motion was made for a new trial, with rule to enter up judgment, *non obstante veredicto*, which was overruled March 10, 1871, (Rec., p. 19,) and the case referred back to the auditor with instructions to distribute the money in accordance with the law and the facts as found by the verdict of the jury, and to report the same to the court.

Ibid.

The assignees of Born were appointed March 30, 1868, and Born's property was assigned to them as of date January 31, 1868, and the assignment at once recorded.

Rec., pp. 2, 35, 43.

All the proceedings of the insurance company were taken against the assignees as terre-tenants. Mrs. Fritton never issued any execution upon her confessed judgment. The auditor awarded the fund to Mrs. Fritton, and the assignees excepted. The exceptions were overruled and the report confirmed by the district court, without reasons, and the assignees appealed to the supreme court of Pennsylvania. This latter court affirmed the judgment; and the assignees have prosecuted this writ of error to revise the judgment.

QUESTIONS.

First. Can a bankrupt, within a few days of proceedings for involuntary bankruptcy against him, give a power of attorney to confess a judgment for an old debt in favor of a creditor, which judgment will lawfully operate as a lien or judicial mortgage upon all the bankrupt's estate in favor

of the preferred creditor, and to the prejudice of the mass of creditors?

Second. And when the representative of the mass of creditors asks for the proceeds of a sale under a prior valid mortgage, made by judicial process issuing from a State court, can the holder of an alleged lien resulting from a confessed judgment for an old debt in the same court, entered within fifteen days from the commencement of involuntary proceedings in bankruptcy, require the State court to grant a feigned issue, and on any verdict of a jury enforce such lien, whilst the bankrupt's assignees oppose its allowance and deny its valadity?

Third. In such a controversy as this have the State courts jurisdiction to enforce any such lien as that claimed by the judgment-creditor, the defendant in error, in this case?

Fourth. Where no levy is made on a confessed judgment, or not till *after* petition in bankruptcy filed, can the rights of the creditor be determined in any way but in the meetings of creditors and under the jurisdiction of the United States bankrupt court?

ASSIGNMENT OF ERRORS.

First. The State court was without jurisdiction over Mrs. Fritton's claim. It erred in granting a feigned issue to her on her affidavit, (p. 3 of Record;) it erred in not entering up judgment in favor of the assignees on the rule for judgment *non obstante veredicta;* and also in giving judgment in favor of Mrs. Fritton on the fourth finding of the jury.

Second. The State court erred in disregarding the vari-

ous provisions of the United States bankrupt act in regard to preferences given by bankrupts.

Third. In validating a judgment entered upon warrant of attorney, neither given in good faith nor for present consideration; and in enforcing an alleged lien resulting therefrom contrary to the 14th, 27th, and 39th sections of said bankrupt acts.

Fourth. In disregarding the first and third findings of the jury, and treating as conclusive the second and fourth.

Fifth. In not awarding the entire fund to the assignees, and in awarding the fund to Mrs. Fritton in violation of a binding national prohibitory law, and in a case where the court below was without any incidental or other jurisdiction.

ARGUMENT.

An inhibition of preferences was the rule of the Roman law from Julius Cæsar, who legislated the *cessio bonorum* in the interest of the debtor class, and still remains the law of the continent.

4th Mommsen's Rome, p. 473, *et seq.*

The jurisprudence of Pennsylvania, on the contrary, encouraged and enforced preferences.

Worman *vs.* Wolfersberger, 19 Penna. Rep., 63.
See, also, 20 *Ibid*, 37; 21 *Ibid*, 495; 23 *Ibid*, 481; 28 *Ibid*, 279; 38 *Ibid*, 446; 45 *Ibid*, 462.

And in violation of a national law strictly prohibiting preferences, the State courts have enforced a preference in this case upon the simple principle nowhere perhaps more

sententiously expressed than in the cause of Allentown Bank *vs.* Beck, (49 Penna., 398,) by P. J. Maynard: "A "debtor can give a judgment or deed to creditors in secu- "rity or payment of the indebtedness. Indebtedness "ought to be paid. There are higher equities with some "creditors. * * * * It is the impulse of the heart to "pay in preference the more meritorious. *The law would* "*be a tyrant and robber if it did not permit a preference* "*in payment.*"

We must confess that the doctrine and its application in the present case strike us as quite remarkable. But the judgment of both the district court and supreme court of Pennsylvania are without reasons: the *per curiam* of the latter referring only to the auditor's report. "This case "is so well disposed of by the auditor in his report, it is "unnecessary to say more than that the judgment is af- "firmed."

Rec., p. 45.

This mode of attempting to give a preference by confessing a judgment so as to operate as a lien upon real estate, or so as to constitute what is known under the civil law as a judicial mortgage, or mortgage resulting from recording a judgment, is by no means novel. It is as old as the Pandects of Justinian. Ulpian says: "*Simili modo dici-* "*mus et si cui donatum est, non esse quærendum an sci-* "*ente eo cui donatum gestum sit; sed hoc tantùm, an* "*fraudentur creditores. Nec videtur injuria affici is qui* "*ignoravit cùm lucrum extorqueatur, non damnum infli-* "*gatur.*"

If the debtor has made a donation to some one, we do not inquire whether the donee had knowledge of the transaction, but *simply whether creditors are defrauded.* In such a case, no wrong is done to the donee who knew not

the fraud, because no loss is caused to him, and he is only deprived of the means of gaining.

L 6, § 11, *Quæ in fraudem creditorum*, 42, Book 8, Title of the Digest.

This was and is the law of Scotland.

2 Principles of Equity, 203. *Home.*
Record, p. 13, at foot.

"In general it is an act of justice to a creditor, and even "of prudence and economy in a debtor, to grant an acknowl- "edgment for debt when demanded of him. But as the "effect of it may be to enable the creditor to proceed with "diligence more rapidly than if retarded by the necessary "delays of an action; * * * and as it is possible for "a debtor to create great inequalities among his creditors by "favoring one and delaying another, such interference on "the part of the bankrupt is held illegal."

2 Bell's Commentaries, 212, Ed. 1826.

And it was and is the law of England.

Worseley *vs.* Demattos, 1 Burr, 477.
Sir George Newland's case, 1 P. Williams, 92.
Orlebar *vs.* Fletcher, 1 P. Williams, 737.
London Biscuit Co., L. R., 12 Equity, 193, *ad fin.*

No other doctrine is reconcilable with the provisions of the United States bankrupt law and the decisions of this court.

Toof *vs.* Martin, 13 Wallace, 40.
Traders' Bank *vs.* Campbell, 14 Wallace, 87.
Buchannan *vs.* Smith, 16 Wallace, 277.
Wager *vs.* Hall, 16 Wallace, 584.

And the present case is directly covered by the principles enunciated in—

Wilson, assignee, *vs.* City Bank, January, 1874. See Legal Intel'r, Jan. 23, 1874.

Zahm, assignee, *vs.* Fry, Legal Int'r, June 19, 1874, U. S. circuit court for Pennsylvania.

The errors of the auditor are numerous: *first*, he entirely overlooks the *executory* character of the judgment, and regards it as *executed; second*, he treats the question before him as one of fact, when it was one of law; *third*, he mistakes as to the party on whom is the burden of proof; *fourth*, he proceeds in direct antagonism of the common principle that every man is presumed to intend to accomplish all the natural and necessary consequences of his acts; and, *fifth*, he contradicts that very portion of the findings of the jury on which he relies: he makes Mrs. Fritton's judgment operate as a preference, when the jury say it was not intended so to operate.

We refer to Record, pages 11 to 16, inclusive, for authorities in support of these positions, and make that argument a part of this brief.

But we contend that, on the face of the Record, the State courts of Pennsylvania were entirely without jurisdiction over the matters involved in this controversy. "These "courts cannot draw to their jurisdiction the administration "of the bankrupt law by the enforcement of a *bona fide* "lien."

After the uncontested liens were paid the residue should have been handed over to the assignees.

McLean, assignee, *vs.* Lafayette Bank, 3 McLean, 185.

The reasons given by Judge McLean are as applicable to the bankrupt law of 1867 as to those of 1800 and 1841. The harmony of the law and its uniformity of operation under the Constitution are both impaired, if not destroyed, by giving the State courts any jurisdiction whatever even over valid and uncontested liens. The principles that "a "debtor's property is the common pledge of all his cred- "itors," and that "the proceeds of it must be distributed "ratably among them unless there exist some lawful cause "of preference," can, under the bankrupt law of the United States, be successfully carried out, in our opinion, only by the national courts. The circuity of action is very great, and the consequent delays enormous, and the practice leads to a perversion of the 25th section of the judiciary act, and unnecessarily inflicts large additional labor upon this court. It is clearly unscientific to make the judiciary act in its 25th section the conduit pipe for the administration of the United States bankrupt laws. Indeed, whilst we freely admit the importance of the State courts administering the national laws in a great variety of cases, yet it is manifest that under the bankruptcy clause of the Constitution it cannot be done in such a case as this, *and in this way.* Thirty-seven State supreme courts passing upon the various provisions of the United States bankrupt act, and interpreting liens under State laws without regard to the provisions of the national law, would be an intolerable administration of a really beneficent but most unpopular system of law. The commerce clause of the Constitution naturally and logically requires the uniform bankruptcy

clause of the Constitution, and "commerce repudiates the "subtleties and delays of the *civil* (*i. e.*, municipal) law." *Nec erit alia lex Romæ*, &c.

The analogy between the jurisdiction of the admiralty by virtue of a valid lien upon a ship, and the jurisdiction of the State court by virtue of a valid mortgage or other *jus ad rem*, is striking. In the former case it is well settled that the admiralty court has no jurisdiction after the payment of the admiralty liens to distribute the proceeds, as in a court of bankruptcy. (See the *Lotawana* case decided at the last term.) We submit the same principle is involved here. The judgment-creditor in this case is an ordinary or general creditor, and whether he have a lien or not is a question which can only be solved by a United States bankrupt court.

We therefore pray that the judgment be reversed, and that the assignees, appellants, be decreed the entire sum now in the hands of the prothonotary of the district court, with interest and costs and general relief, and that the same be distributed in the United States bankrupt court.

DURANT & HORNOR,
Attorneys for Assignees, Appellants.

WASHINGTON, D. C.,
May 4, 1874.

MAYS AND HORNER

VS.

F. FRETTON.

COUNTER AND SUPPLEMENTAL STATEMENT, WITH ARGUMENT BY COUNSEL FOR DEFENDANT IN ERROR.

Geo. W. Bell, Book and Job Printer, 731 Filbert St., Philad'a.

SAMUEL V. MAYS, and CHARLES W. HORNER, assignees of August Born, Bankrupt, Plaintiffs in Error,	Supreme Court of the U. S. Court.
	December Term, 1872.
	No. 329.
vs.	Writ of Error to the Supreme Court of the State of Pennsylvania.
FREDERICA FRETTON.	

Counter statement and argument for the Defendant in Error.

This is a Writ of Error to a State Court as to the distribution of money arising from the sale of the property of August Born, a bankrupt, under the sale of his real estate under a mortgage executed by him long before the passage of the Bankrupt law. The mortgage on which the property sold was executed in August, 1862; a judgment recovered upon it in August, 1868; andthe property sold in July, 1868. At the sale by the Sheriff of Philadelphia city and county, the property was sold for a sum sufficient to pay the two first mortgages and a judgment which was prior in date to the one now in controversy, and the Sheriff paid into Court for distribution the sum of $7,247 65.

This sum having been thus paid into the District Court for the City and County of Philadelphia, under the statutes of Pennsylvania and the practice of the Court in that State, an auditor was appointed to distribute this sum amongs the lien creditors.

By the laws of that State, a judgment is a lien upon all the real estate of the defendant in the judgment, whether legal or equitable of any kind, and the fund in Court is distributed among the various lien creditors, according to the date of the entry of their judgments.

This sum of $7,247 65 having been paid by the Sheriff into Court, prior liens having been paid, then the Court appointed an auditor to distribute this sum according to law of that State.

The defendant in error appeared before the auditor, and claimed

the amount of a judgment which she had caused to be entered against August Born, the mortgager, after the execution of the mortgage upon which the property was sold, the judgment being for $4,500, entered in Court upon the 16th day of January, 1868.

The plaintiffs in error, assignees in Bankruptcy, appeared in person and by counsel before the auditor, and claimed the whole fund, and alleged that the judgment of the defendant in error was void, because it was given in fraud of the Bankrupt law, and for the purpose of hindering, delaying and defrauding other creditors of the said bankrupt. All the allegations made by the assignees were denied by the defendant in error and plaintiff in said judgment; and under the law of that State, and the rules and practice of said District Court, she demanded an issue to try the facts alleged on the one side and denied on the other.

According to the rules and practice in that Court the auditor made a special report of the facts, the situation and allegations of the respective claimants to the fund, and a demand for a trial by a jury of the country. On his report the District Court directed an issue, and as was said by the Judge who tried the cause, *on sharp points*. On these questions or points the cause was tried before a jury, under a learned charge by an able Judge, when the jury rendered a verdict in favor of the defendant in error, on all the material questions submitted to them.

On that being thus rendered, the assignees in bankruptcy moved for a new trial, and that a judgment be rendered in favor of the plaintiffs, the assignees, *non obstante veridicto*, both of which applications were overruled by the District Court, and the case was referred again to the auditor to distribute the fund in Court, according to the law and the facts as found by the jury.

The counsel appeared for the assignees and the judgment creditor, and after a full hearing the auditor made a full and learned report, which will be found in the appendix to this argument.

To that report so made by the auditor, exceptions were filed and argued before the District Court, when, after argument, the exceptions were dismissed, and under the laws of that State the plaintiffs in error appealed to the Supreme Court of Pennsylvania.

When the appeal came before that tribunal, and after a full argument, the opinion of the Supreme Court was given on the 26th day of February, 1872, in these words: "*Per curium*, This case "is so well disposed of by the auditor in his report, it is unneces- "sary to say more than that the judgment is affirmed."

Hence we have no reasoning by the learned Court upon the points of law discussed; and we submit, that if this Court will carefully read the exhaustive report of the auditor as he has found the facts, a like result must follow in this Court.

ARGUMENT.

We think that there is no point of law better settled by this Court, than that in all matters of State laws the principles ruled, adjudicated and settled by the Court of last resort where the controversy has arisen under the statute laws of the State, or the practice adopted by that Commonwealth, will control and govern the decision of the Supreme Court of the United States. This is an axiom of the law *too* familiar and *too* often decided to require any citation of authorities.

The controversy in the present cause has arisen under the laws of that State, relative to the distribution of money arising from the sale of real estate under legal process, by the Sheriff of the City of Philadelphia. The sale was made under a writ, regularly issued out of the District Court of that city. After the sale of the property for $26,000, the Sheriff paid into Court the balance remaining in his hands after the satisfaction of mortgages and undisputed liens.

That money having thus been paid into Court, the case was, under the practice which prevails under the laws of that State, referred to an auditor for distribution, when, if the Court approve of such distribution, it is final and conclusive upon all parties who appear to claim the fund.

And the report of the auditor finding the facts in the cause are conclusive, unless there is a clear and *palpable mistake* or *manifest error* in the report of the auditor, either in law or fact. In the present cause the District Court found no such mistake or error, nor did the Supreme Court, a tribunal of last resort.

To establish the point of law above stated, we beg leave to refer to the following cases, decided in Pennsylvania:

Riddes' Estate, 7 Harris 434: In that case the late Chief Justice Lewis says: "Although we might not have drawn the same con-"clusions the auditor did, to justify us in setting it aside there must "be a *plain mistake*, and that manifestly against the evidence."

In Bradford's appeal, 5 Casey 513: It is decided that the finding of an auditor on the facts will not be set aside by the Court, except *for flagrant error.*

See also Miller's appeal, 6 Casey 478, on page 492: Woodward Judge says: "When a question of fact is involved on which the "report is according to law, it is final and conclusive, unless there "is a *flagrant mistake.*"

Hence we find it decided in Menges' appeal, 7 Harris, pages 221 and 222, by Lowry, Judge: "Where facts have been found by the "auditor and approved by the Court below, the case must manifest "flagrant error to justify the Supreme Court in interfering with the "report."

In White's appeal, 12 Casey 139, Thompson C. J. says: "The "auditor's finding of facts from the testimony is always conclusive, "unless plain mistake be shown, or, as it is sometimes said, *palpable* "or *flagrant error exists.*"

The same doctrine is laid down in Pennsylvania in equity cases as to the report of a Master in Chancery. Hence Judge Strong, in the case of Landis *vs.* Scott, 8 Casey 495, says: "On an appeal the "facts will be taken as found by the Master, unless in case of *mani-*"*fest error or plain mistake.*"

And in the last case decided on this point in Pennsylvania,

Colememan's appeal, 12 P. F. Smith 281, Judge Sharswood, in delivering the opinion of the Court, uses this language: "The office "of a Master in Chancery is like to that of a jury in Courts of Com- "mon Law. If there has been a clear mistake or a palpable abuse "of power, either of them ought to be corrected. But if anything "should be done or inquiry instituted beyond that as to matters *of* "*fact*, the office of a Master would prove but little aid in the admin- "istration of justice—the Court being compelled to go over the whole "evidence again, and thus their labors greatly and unnecessarily in- "creased."

We have cited the above decisions as the law of the State where this cause was decided, and respectfully ask this Court to apply them to the cause as it is now presented on the record.

The auditor has found that *when* the judgment was given to the defendant in error, Mrs. Fretton, she did not know that Born, the defendant in the judgment, was insolvent, *nor had she reasonable cause for believing that he was a bankrupt.*

What is there upon this record to enable this Court of Error to decide that there has been a *mistake or flagrant error* in the finding of the auditor on these material facts? That the judgment on which the auditor has awarded the money is prior in date to the adjudication in Bankruptcy is shown by the record. And if it was *not* given in fraud of the Bankrupt law, then the judgment of the State Court is correct.

The auditor has found on all the facts proved in the cause, that when the judgment was given it was for a debt due the plaintiff in that judgment for money borrowed, and that *she did not know, nor had she reasonable cause* to believe that Born, the defendant, was insolvent or a bankrupt.

We ask on what ground then can this Court say that the finding of the auditor *was erroneous*, or that there was a *flagrant error?*

But our cause does not rest on that ground alone, as to the verity of the facts involved in it. It will be found on a perusal of the whole record, that an issue was directed by the District Court to try the material facts upon which the assignees in bankruptcy

could claim the fund in Court, against the judgment creditor who had the first lien. One was, whether "the said Frederica Fretton had reasonable cause to believe that the said August Born was insolvent when the said judgment was given." This fact the jury found in her favor.

Another question submitted by the Court to the jury was, "Whether the warrant of attorney on which the judgment was "given to the said Frederica Fretton was a preference over the other "creditors of August Born?" This fact was found in favor of the defendant in error.

On such a record of the facts, how can it be said there was a *palpable* and *flagrant error* by the auditor in his report? A motion was made for a new trial and to set aside the verdict, which was refused. The case was again referred to the auditor to report on the law and the facts. Then these assignees of the bankrupt had another and further hearing on the facts before him, and he found as the jury did, and that report was confirmed by the District Court and the Supreme Court of the State of Pennsylvania.

The question of law which arises on this record is a plain one, and it is this, that a judgment confessed by an insolvent debtor is *not affected* by his subsequent bankruptcy if there was no fraud and the creditor had no notice of his insolvency, or had reasonable ground to believe that he was insolvent. That a judgment thus given is a valid judgment, and is entitled to a *priority* on the distribution of the money made on the sale of his property, is settled beyond controversy by the various decisions of this Court and the Courts who have adjudicated upon the present Bankrupt law, and cases which arose under the provisions of the Bankrupt law of 1841, which was as to a preference to creditors like the present.

The doctrine ruled by Mr. Justice Curtis in the case of Buckingham *vs.* McLean, 13 Howard 150 (opinion will be found on pages 167 and 168), rules the present cause on the facts found by the jury and the auditor.

The State of Pennsylvania has always recognised the right of an assignee in bankruptcy to come in and claim the fund upon the distribution of money paid into Court.

I refer to Biddle's appeal, 18 P. F. Smith 13, which has decided the present cause before this Court. The opinion was delivered by the late C. J. Thompson. I will cite his short opinion in that case.

"It is contended,—

"1st. That a State Court could distribute the fund among "creditors.

"2d. That the judgment to which it was distributed was given "in fraud of the Bankrupt law.

"As to the last of these objections the auditor fully and com- "pletely negatives them, by showing that the judgments were not "given as preferences, or taken by the creditor with any knowledge "of the insolvency or contemplated bankruptcy of the insolvent. "He has not reported the testimony so that this Court might see "whether he erred in fact on this point or not. The report must "therefore be regarded as conclusive as to this."

Such is our case now before this Court. We ask in the present cause that such a ruling shall be recognised as the law in the present case.

In that cause the Supreme Court of Pennsylvania fully recognised the rights of a bankrupt assignee to come into the Court and claim the fund under the Bankrupt law, if he could show a superior claim to an older lien creditor, or show that the judgment was given in fraud of the Bankrupt law.

But that when on the facts it was found by an auditor who was distributing the money that there was *no fraud*, and that the judgment was not given in violation of the 35th nor 39th Section of the Aankrupt law, the assignees had no claim to the fund as has been found and decided by the Court below in the present cause.

Now, it is difficult to distinguish that cause from the present. The authorities to sustain that opinion are numerous. Many are cited by the auditor in his very able report, which is printed in the appendix to our argument. I also refer to Brightly Bankrupt law, page 73 note; the compiler refers to the case of Joseph B.

Wright, Jr., Bankrupt Register, page 155. If that is regarded as an authority, it rules the present cause. In order that my argument and its force may be fully comprehended, I refer to the appendix as to the issues found by the jury. First, that when the warrant of attorney to confess judgment was given, *she* had no reasonable cause to believe that Born was insolvent, and this is found in her favor and second. That the judgment was not given as a preference over other creditors.

These issues being found in favor of the defendant in error, relieves her case from the effect and operation of the 35th and 39th sections of the Bankrupt Law of 1867—under all the authorities which can be found in the books.

The Bankrupt Law of 1841 as to judgments and preferences for creditors was almost in the same language as that of 1867. In numerous cases in Pennsylvania the Supreme Court gave a constitution to that law. It was such as has been ruled by the various District Courts in the Union, and, as I will presently show, by this Court, and such as we now contend for, and such as was given under the facts presented by the Court of Pennsylvania in this cause.

In Wilkinson's appeal, 4 Barr, 284, on page 280 it is said by Judge Coulter, a confession of judgments is always *boni fide* when the debt to secure it was honestly due, unless done to accomplish some unlawful purpose. In the present case the jury and Auditor have found there was no fraud nor unlawful purpose. That it was not given as a preference, nor was it given when the creditor knew that her debtor was insolvent, nor had she reasonable cause to believe he was insolvent. Why, then, should not her prior lien be paid out of the fund?

In Miller *vs.* Black, 1 Barr, 420, opinion on pages 422 and 426, Judge Kennedy rules the law as we contend it is, and as decided by the State Court in the present cause.

In the consideretion of this cause it is to be born in mind that August Born was an involuntary bankrupt, drawn into Court as appears by plaintiffs paper book, on the petition of his creditors and against his will. The bankrupt law being resisted by him to the last.

I do not suppose that the decisions of the various District Courts are binding upon this Court, but I cite some of them as in my opinion being sound law and a proper construction of the bankrupt law.

The case of Re Wright, 2 Bankrupt Register, page 155, was a case like the present, where a judgment was sustained by the Court upon the ground that the creditor did not know that the defendant was insolvent nor had no reasonable ground for so believing.

We also refer to the case of *exparte* Hugh Campbell, 7, American Law Register 102; *exparte* Wm. Burns, page 105; Wordsworth *vs.* Taylor, 2, Bankrupt Register 101, page 123.

The case of Campbell *vs.* The Tradesman National Bank, 3, Bankrupt Register 124. This case decides where a man acts without knowledge of the condition of the party, or anything to create suspicion of his solvency, and obtains a judgment for security and a debt is honestly and justly due, the Bankrupt Law will not interfere with it. And we refer in particular to the language of the Court on page 126, as ruling the law on sound principles. All the cases above cited are in full accord with the principles decided by this Court. In the case of Wilson, assignee of Vanderhoof Bankrupt Complainant *vs.* The City Bank of St. Paul, No. 94, October Term, 1873, opinion delivered by Mr. Justice Miller, and we submit it rules the present under the facts found by the report of the auditor which must be considered as all the facts in the cause.

We will not quote all that is said by the learned Judge, but refer to one or two expressions contained therein.

"Though the judgment creditor in such case may know the "insolvent condition of the debtor, his judgment and levy upon "his property are not therefore void, and are no violation of the "Bankrupt Act."

But in the present cause a jury have found that the creditor did not know, nor had she reasonable cause to believe that her debtor was a bankrupt or insolvent, and so it has been found by the auditor.

The learned Judge in that case further rules thus: "A lien thus "obtained by him will not be displaced by subsequent proceedings "in bankruptcy, though commenced within four months after levy "of the execution or rendition of the judgment."

To us it seems that this case is decisive of the cause now before the Court, and is of so recent a date that further authorities on this point are not wanted.

We do not know what will be the argument of the plaintiffs in error, as we have not been furnished with a copy of the same; but it was argued in the Court below, that the judgment of the defendant in error had no lien by her judgment until an execution was issued and a levy made—such is not the law in Pennsylvania.

The Supreme Court of that State has decided thus: "The lien "of judgments in Pennsylvania has been extended beyond the "limits of the common law. A judgment is lien on every kind of "equitable interest in land and on every right vested in the debtor "at the time of the judgment and on the *venditioni* the sheriff sells "and conveys all his right, such as it may be." Carkhuff *vs.* Anderson, 3 Binn 5: Thomas *vs.* Simpson, 3 Barr 60: Carneghan *vs.* Brewster, 2 Barr 41, on the sale of the equitable interest of a vendee under articles of agreement, the proceeds are to be distributed according to the priority of liens.

That this Court have adopted the rule as to liens of judgments in Pennsylvania as well as in most of the other States in the Union, where by the State laws is fully decided in the case of Bayard *vs.* Lombard, 9 Howard 530, upon an able report made by an auditor in that case, which was confirmed by the Circuit Court of the United States Court for Pennsylvania, and afterwards sustained by this Court.

In that case we see it reported "That the liability of lands to "execution in the Courts of the United States does not arise from "any act of Congress expressly making them liable, but upon the "operation of the process acts of 1789 and 1792; the State law "upon the subject being thereby adopted, should be considered as "also adopting the effect and operation of the judgment lien."

We invoke that rule of law in the present case, having shown that a judgement in Pennsylvania is a lien upon all interest in land there that the debtor had. See on this point Taylor *vs.* Thomson, 5 Peters 358, also Thompson *vs.* Philips, 1 Baldwin 273, Conrad *vs.* The Insurance Co., 1 Peters 386. The Court says, "It is not "understood that a general lien by judgment on lands constitutes "*per se* a property or right in the land itself. It only confers a "right to levy on the same to the exclusion of other adverse interests "subsequent to the judgment, when the levy thus made relates to "the judgment," &c.

It was argued in the Court below that this was an equity proceeding, and that the relief against the judgment belonged to a Court of Equity. If that doctrine should be held by this Court, then this writ of error must be dismissed, as ruled in Bayard *vs.* Lombard, before cited, 9th Howard 530.

Counsel to sustain that position cites Hummel's appeal, 8 Harris 217, but that case only decides that the discharge of an executor puts an end to the proceedings and an appeal did not lie. Shenks appeal, 9 Casey 271; that case decides that the Court did right in confirming the auditors report, and that if a judgment is improperly used beyond its legal amount it belongs to equity to correct it.

But in our case we are only using the judgment as the law authorizes us to do, to obtain out of the fund paid into Court the sum which is due upon the same as a first and prior lien superior to any adjudication in bankruptcy.

The next case cited is Baker *vs.* Williamson, 2 Barr 119; what is there decided? It is this: "Where a Court of Common Pleas "decided on a case under the chancey powers vested in it by Act of "Assembly, direct an issue, a writ of error will not lie to the "proceedings thereon in a Court of law. The remedy is an appeal "from the decree by the Court in chancey."

In our case an appeal was taken from the District Court to the Supreme Court of the State and there decided. We may now ask how can a writ of error lie to this Court under that authority cited by plaintiffs counsel? But more still was ruled in that case on page 118. "It is said a feigned issue is to inform the conscience

"of the Court on disputed facts, and is to be moulded as th ir "discretion dictates, and the mode by which it is done by the "Court below is not the subject of a writ of error, and cannot be "judicially decided by the Supreme Court." Such was done in the present cause, and the Court awarded the money under the issue to the defendant in error, and we ask that this decision be sustained.

The next case is Jones *vs.* Erle, 5 Barr 232. In that case the Supreme Court of Pennsylvania decided on a feigned issue to try the validity of a judgment, confessed by one who had assigned for the benefit of creditors, a writ of error does not lie; so we contend in this case.

The next case cited is Todd *vs.* Campbell 8, Casey 250. That was an action of ejectment, when it was alleged that a deed, apparently indefeasable, was a mortgage. And under a full examination of all the facts in the cause, Mr. Justice Strong, in delivering the opinion of the Court, ruled that the Court below should have instructed the Jury that the Plaintifis were not entitled to recover, upon the ground that there was not sufficient in the cause to show that the deed was a mortgage.

The next case is Blakely appeal 7, Bar 449. That case decides that a judgement confessed to secure creditors are not such preferences as are awarded by the Act of 1843, although an assignment for creditors was intended and was shortly afterwards executed.

The next case is Hersly *vs.* Werting 14, Wright 240. This case only decides that a Court of Equity will not recind an executed contract made to hinder and delay creditors. Such is not our case, because the Jury and Auditor have found that the judgment to Mrs. Fretton was not given to hinder, delay or defraud creditors.

Another case cited is Miller's Appeal 6, Casey 478. We find by the sylibus of this case that the Court decides an Auditor's report when a question of fact is final and conclusive, unless there be flagrant mistakes. That is what we contend for and no mistake is shown in the present cause. Also, it is decided in this case a

contract infected with actual and positive fraud is not merely voidable but void, and is incapable of confirmation without a new consideration.

Such is undoubtedly the law of the land. But where is there any evidence before this Court of actual and positive fraud? How is that shown from this record now before this Court.

It cannot be found. No one fact in this cause establishes it. But on the contrary, we have the verdict of a Jury, the report of an Auditor, the judgment of the District Court of Philadelphia, and the judgment of the Supreme Court of that State. That after a careful examination of all the facts in the cause there was no *no fraud between the parties when this judgement was given to the defendant in error.*

The next case cited from Pennsylvania is Blystone *vs.* Blystone 1, P. F. Smith 373. The point there decided is this: "Where the "parties to a fraudulent or illegal contract have fully executed it, "Courts of Justice will not therefore, interfere but will hold them "bound as they found them." But this case can have no application to the cause on trial before this Court. A Jury has found there was no fraud in the confession of the judgment. So has the Auditor reported, whose report *is conclusive.*

The next argument on the other side is, that taking the facts as true that the judgment to Mrs. Fretton was not fraudulent as found by the Jury. But as there was no execution, no condemnation made of the property of Born, and the money not paid to her her lien was never perfected. But, as has been shown by the authorities cited, when her judgment was entered the lien, under the laws of Pennsylvania, was perfect and complete, and she entitled to the money against all subsequent claimants. The argument on the other side is, Mrs. Fretton was without any vested right in the property. But by the lien on the real estate, when that was sold she had a *legal right* to the money that was realized by the sale. That is what she now claims.

The next argument used is, that the Court is not bound by the findings of a Jury in feigned issues. But the State Court would not set the virdict aside, and ruled the cause on that finding and

the report of the Auditor. Is such decission binding on this Court? Will this Court, when the testimoney is not before them, say that the Court below was in error by the rendition of a judgment on such a verdict? When the Court below have decided that the report of the Auditor on the facts and the law presented is correct—when all such reports are held valid by the State Court, unless there is a *flagrant mistake or palpable error*, will such a decision be set aside by this tribunal?

Who is bound to show the *flagrant mistake*, the *palpable error?* Not the defendant who has the judgment of the Court below, but the plaintiffs in error. Have they, by any facts upon the record, shown that there was any error in the ruling of three tribunals in the State of Pennsylvania? We have not seen any such error made manifest upon the record or in argument.

More than all this, what facts are presented for the consideration of this Court but those stated in the report of the auditor? Those, when examined, defeat all the assertions and arguments of the counsel for the plaintiffs in error.

Hence we respectfully ask that the judgment of the Supreme Court of the State of Pennsylvania rendered in this case be affirmed.

JAMES H. PARSONS,
& A. V. PARSONS,
Counsels for Defend't in Error.

APPENDIX.

AUDITORS REPORT.

(ORIGINAL.)

The American Fire Insurance Company, Assignees, &c., *vs.* August Born.	Lev. Facias, June T., 1868, Nos. 420–421. District Court.

To the Honorable, the Judges of the said Court :

The Auditor appointed by the Court to distribute the fund raised by the above writs, respectfully reports,

That having given notice of his appointment, and of the time and place of meeting, to the parties interested, by advertisements twice successfully in the Legal Intelligencer, a paper published in the City of Philadelphia, and also for ten successive days (Sunday excepted), in the Press, a daily newspaper of said City, copies of which are hereunto annexed, marked respectfully A and B; and having also posted a copy of said notice in the office of the Prothonotary of said Court six days before the hearing, agreeably to the rules of Court in such case made and provided, he was, at the same time and at subsequent meetings, attended by A. V. Parsons, Esq., of counsel for Frederica Fretton (late Spielberger), surviving executrix of Joseph Spielberger, a judgment creditor, D. C., D. S. B., D. 67, No. 355, dated and entered January 16th, 1868, for $4,500.

G. W. Dedrick, Esq., of counsel for Louis Schwarzwalder, et al, trustees, mortgages of premises sold, for $2000.

Jno. A. Clark, Esq., of counsel for G. Rappold, a judgment creditor, D. C., D. S. B., D. 37, No. 389½, entered January 20th, 1868, for $1000.

Geo. W. Thorn and H. R. Warriner, Esqs., of counsel for C. W. Hornor and S. V. Mays, assignees in bankruptcy of August Born, the defendant, and by said assignees in person.

Geo. W. Thorn, Esq., of counsel for F. Blackburn, Jr., and W. Massey, et al., judgment creditors.

H. R. Warriner, Esq., counsel for John Eddy, et al., judgment creditor, and by August Born, the defendant in person.

The fund in Court ($7,247.65) arises from the sale by the Sheriff of the individual real estate of the said August Born, under proceedings instituted on two mortgages, of the premises, executed by him in the year 1862, both of which were paid by the Sheriff out of the proceeds of the sale.

It was in evidence before the Auditor, that the defendant, August Born, and his co-partners, Reinhold Vollmer, were individually, and as co-partner, adjudged bankrupts by decree of the District Court of the United States for the Eastern District of Pennsylvania, on the 31st of January, 1868, on the petition of F. Blackburn, Jr., a creditor. The deed of assignment of said estate in bankruptcy to C. W. Hornor and S. V. Mays, dated March 30th, 1868, recorded in the office of the Recorder of Deeds for the City and County of Philadelphia, in Miscellaneous Book J. T. O., page 568, was also in evidence.

At the meeting of November 9th, 1868, Mr. Thorn, of counsel for Messrs. Hornor and Mays, assignees in bankruptcy, claimed the entire fund, on the grounds,

First.—It is the property of a bankrupt; and by reason of said bankruptcy, all his estate passed to his assignees.

Second.—He proposed to attack Mrs. Fretton's judgment on the ground that the same was given in fraud of the provisions of the bankrupt law, and that the obligee in that judgment, and her agent, through whose means the said judgment had been procured, had reasonable cause to believe that the obligor was a bankrupt, and contemplated bankruptcy at the time the judgment was given.

Third.—That the obligee is the mother-in-law of the obligor,

August Born, and that in contemplation of bankruptcy he gave this judgment with the intention of preferring her, by way of security, for a past debt.

Fourth.—He further proposed to attack the consideration of that judgment, and to require Mrs. Fretton (the claimant) to produce evidence that the money was loaned long before the judgment was given, or that the money was borrowed at any time. And he further proposed to show that the said judgment was given with the intention to hinder and delay the proper creditors of the defendant from obtaining payment of their just debts.

Mr. Parsons, for Mrs. Fretton, the judgment creditor, denied all the allegations made by the counsel for the assignees in bankruptcy, except that the plaintiff, in the said judgment, is the mother-in-law of the defendant, and asked that the Auditor shall state and certify to the Court, that the plaintiff in said judgment demands an issue before the District Court for the City and County of Philadelphia, to try these disputed facts.

The demand, in writing, for said issue, accompanied by affidavit of the claimant, was filed with the Auditor on the 10th day of November, 1868, and is hereunto annexed, marked "C."

The first lien upon the fund is a mortgage of the premises in question for $2000, (with interest thereon, due from January 21st, 1868, to 6th of July, 1868, the day of sale), executed by said August Born to Louis Schwarzwalder, T. Gramlick and F. Doll, trustees of Almania Lodge, of the Independent Order of Odd Fellows, dated January 21st, 1864, recorded at Philadelphia, January 23d, 1864, in Mortgage Book, L. R. B., No. 1, page 182, payable one year after date.

The validity of this mortgage was satisfactorily established, and, with the consent of all the parties in interest, the Auditor respectfully recommends that it be paid out of the fund, pending the determination of the issue herein reported as demanded.

The next lien of record in the order of payment (unless it should hereafter appear that a judgment in favor of the United States,

obtained in the District Court, United States for Eastern District of Pennsylvania, on 27th June, 1866, against said defendant for $1000, upon which $700 has been paid, is entitled to come in on the fund), is the judgment of Frederica Fretton, represented by Mr. Parsons, and as to the right of which to be paid out of the fund in Court, the issue has been demanded.

The Auditor, therefore, does not report a distribution, but certifies the demandfor the issue, in accordance with the rules of Court in such case provided.

Respectfully submitted,

November 10th, 1868. EDWIN P. CHASE, *Auditor.*

AFFIDAVIT OF MRS. FRETTON, (ANNEXED).

Frederica Fretton, the plaintiff in said judgment, being duly sworn according to law, doth declare and say, that the fund in Court is not the property of the alleged bankrupt, and that it did not pass to his assignees in bankruptcy.

Second.—That she denies that the said judgment was given in fraud of the provisions of the bankrupt law.

Third.—That she denies that she and her agent, through whose means said judgment was procured, had reasonable cause to believe that, at the time, the said obligor was a bankrupt, and contemplated bankruptcy when it was given.

Fourth.—That it is true she is the mother-in-law of the said obligor, but she denies that the said August Born gave said judgment in contemplation of bankruptcy, and with the intention of preferring her for a past debt; at all events, no sach intention was manifested, or declaration made, when the said judgment bond was given to her, nor did she accept it on such terms.

Fifth.—This deponant asserts that the money loaned, and which

was the consideration for which said judgment bond was given, was loaned by her to the said defendant long before the said bond was executed, a part of it some years before the date thereof.

Sixth.—And this affiant denies that the said judgment was given for the purpose of hindering, delaying or defrauding the creditors of said Born. And in as much as these material facts have been asserted on the one side, and denied on the other, she has, by her counsel, demanded an issue, to try all these disputed facts before a jury, in the Court where the fund is now held.

Sworn to and subscribed before me, November 10th, 1868,
J. P. DELANEY,
Alderman.

FREDERICA FRETTON.

AUDITOR'S SUPPLEMENTAL REPORT.

FILED, MAY 13TH, 1871.

That since the filing by him of an Interlocutory Report in the above case, on 7th December, 1868, the issues therein reported, and which were subsequently ordered by the Court, have been disposed of, as will fully appear by reference to an exemplification of the Record, hereunto annexed and marked Exhibit "A."

That on the 18th March, 1871, the Court, by an order then made, referred the above case back to the Auditor "with directions to "distribute the money in accordance with the law and the facts as "found by the verdict of the Jury, and to report the same to the "Court."

That in pursuance to said order, he notified the parties in interest that he had appointed 5th April, 1871, at 4 o'clock, P.M., at his office, No. 615 Walnut Street, in the city of Philadelphia, for a meeting and hearing of said parties, when and where he was attended by

A. V. Parsons, Esq., of counsel, for Mrs. Frederica Fretton, Executrix, judgment creditor.

H. R. Warriner, Esq., of counsel for John Eddy, et al., judgment creditors, and by

C. W. Hornor, Esq., who appeared for himself and S. V. Mays, Esq., as assignees in bankruptcy of August Born, bankrupt, and the defendant in the executions.

The first judgment on the searches, which appears to be a lien on the fund in Court, is in favor of the United States obtained in the United States District Court for the Eastern District of Pennsylvania, 27th June, 1866 to May Sessions, 1866, No. 21 for $1000.

This judgment, which was for a penalty under the Internal Revenue law, was alleged to have been paid long since, and testimony was taken, which satisfied the Auditor, that, although it appears to be unsatisfied of record, there is nothing due to the United States, the same having been compromised and settled by defendant for the sum of $700. which was paid with the approval of the Attorney United States East District of Pennsylvania. It cannot, therefore come in on the fund in Court. This judgment was not represented before the Auditor, although the District Attorney was personally notified by him, of these proceedings.

The next lien of record in the order of payment, is the judgment in favor of Mrs. Frederica Fretton, in this Court, to December Term, 1867, No. 355, D. S. B. obtained January 16th, 1868, for $4500.

This judgment was entered upon a Bond and Warrant of Attorney, dated on the same day on which judgment was entered, at which time, or shortly before, the said August Born was engaged extensively in business in this city as a brewer.

It was in evidence before the Auditor, that the real estate of the said August Born, a portion of the proceeds of the sale of which is now in Court for distribution, was sold by the Sheriff on 6th July, 1868, under the two above mentioned writs of Levari Facias,

issued upon judgments obtained on two seperate mortgages of said premises made by said Born. The mortgages, and some other debts of record, were paid by the Sheriff, and the residue of the fund was paid into Court.

Another mortgage of the same premises has since been paid by direction of this Court upon the Interlocutory Report of the Auditor, heretofore referred to.

It was also in evidence, and admitted, that on the 31st January, 1868, the defendant, August Born, was proceeded against in this Judicial District as an involuntary bankrupt, and after a trial by jury, he was adjudicated a bankrupt on 20th February, 1868. The assignment of his estate in bankruptcy to C. W. Hornor and S. V. Mays, Esqs., dated 30th March, 1868, was also in evidence.

Under the order of Court of March 18th, 1871, referring the case back, it becomes the duty of the Auditor to consider and determine the legal status of the parties claiming the balance of the fund, since the determination of the issues herein before referred to.

The issues awarded by the Court were:

1st. Whether at the time the warrant of attorney, upon which judgment D. 67, 355 was entered was given by the said August Born to the said Frederica Fretton, he, the said August Born, was insolvent?

2d. Whether, at the time of the giving of the said warrant of attorney, the said Frederica Fretton had reasonable cause to believe that the said August Born was insolvent?

3d. Whether the said warrant of attorney was given by the said August Born to the said Frederica Fretton to secure the payment of a prior debt?

4th. Whether the said warrant of attorney was given to the said Frederica Fretton as a preference over the other creditors of August Born?

In said issues, the assignees in bankruptcy were plaintiffs, and the said Frederica Fretton the defendant.

On 21st January, 1871, the jury found as follows, viz:

On the first issue, for the plaintiffs; on the second issue, for the defendant: on the third issue, for the plaintiffs; on the fourth issue, for the defendant; and on the 10th of March, 1871, a rule for a new trial was refused by the Court.

Mr. Parsons, of counsel for Mrs. Fretton, claimed the amount of her judgment, with interest to the date of the Sheriff's sale, contending that the finding of the jury upon the second and fourth issues was conclusive, and entitled her to payment from the fund; and cited

Re. Joseph B. Wright, 2 B. R., 155; Buckingham *vs.* McLean, 13 Howard, 150; Wilkinson's Appeal, 4 B., 284. Miller *vs.* Black, 1 B., 420; Reigert *vs.* Small, 2 B., 287; Wilson *vs.* Day, 2 Burroughs, 830; Ex-parte Hugh Campbell, 6 Law Reg., 102; Ex-parte W. Burns, 7 Law Reg., 105; Re Wadsworth *vs.* Tyler, 2 B. R., 101; Re W. S. Locke, 2 B. R., 123; In re J. M. Rosenberg, 3 B. R., 33; and Humphreys *vs.* Maitland [a late case in this Court].

He also argued that the finding of the jury in favor of the plaintiff, on the third issue, did not affect his position, because the proceedings against Born in bankruptcy were involuntary.

Mr. Hornor, in behalf of himself and Mr. Mays, as assignees in bankruptcy, claimed the fund in Court, and contended that, under the finding of the jury, Born was bankrupt on the sixteenth day of Janurry, 1868, the day on which he executed the warrant of attorney to confess judgment, that the warrant was given to secure the payment of a prior debt; and that, although the judgment was conclusive as to Mrs. Fretton and Born, it gave her no lien upon the proceeds of the Sheriff's sale, and was contemplated fraud upon creditors and the provisions of the Bankrupt Law. It was also argued, that although the jury found that Mrs. Fretton had no reasonable cause to believe that Born was insolvent when

he gave the warrant of attorney, and that the same was not given as a preference over his other creditors, it was such a fraud on the bankrupt act, by Born, as would exclude her from coming in on the fund, the jury having found that the judgment was confessed to secure the payment of a prior debt, and that Born was insolvent when he gave the judgment.

Mr. Hornor in support of his views cited:

Clark *vs.* Douglass, 12 Sm., 414; Thomsons appeal, 7 Smith, 175; In re Pavitt, 12 Smith, 500; In re Rogers, 2 Bank. Reg., 129; Campbell *vs.* Bank, 3 Bank. R., 124; Rohror's appeal, 12 Smith, 500; Shank's appeal, 9 Casey, 371; Grubb *vs.* Cottrell, 12 Smith, 23; Heishey *vs.* Whiting, 14 Wright, 244; and numerous other authorities, particularly the 35th Section of the Bankrupt Act of March 2d, 1867.

The Auditor has carefully examined the authorities cited by counsel, and it becomes his duty to apply the law to the questions involved, and to reconcile what was contended by the assignees, were conflicting findings of the jury, and to determine how far those findings affect the relation of Mrs. Fretton to other creditors of the bankrupt, and her right, as a lien creditor, to participate in the fund in Court under the provisions of the Bankrupt Act.

The only sections of that Act which are necessary to be considered or referred to, are the 35th and 39th sections.

The 35th Section deals with fraudulent preferences and conveyances, both as affecting the bankrupt and the preferred creditor, and the 39th section defines what acts are to be deemed acts of bankruptcy, including transfer of property with intent to give a preference to creditors, and it embodies some of the provisions of the 35th section.

There are numerous authorities upon the points involved to some of which the Auditor refers, and, as they are all the decisions of Judges of the Courts having jurisdiction in bankruptcy, they are entitled to weight, as containing the law applicable to this case.

Judge Shipman, in Re Wadsworth *vs.* Tyler, 2 Bank. Reg., 101, in speaking of the 35th section, says: "This is the one which re- "lates particularly to fraudulent preferences and conveyances, and "undoubtedly was intended to declare precisely under what circum- "stances any appropriation of the property of an insolvent debtor, "for the benefit of any person, whether to a creditor or by way of "sale to a stranger, should be defeated. . . . The 39th "section defines what acts of the debtor shall be considered ground "for declaring him a bankrupt, on petition of a creditor. Certain "dispositions of the debtor's property are included among these "Acts, and the right of the Assignee to recover from the person to "whom the transfer may have been made, is again declared in "substantially the same terms as in the 35th section, except that "the word 'or' is used instead of 'and,' when referring to the "reason the creditor may have to believe in the insolvency of the "debtor, and the intent with which he disposes of his property in "the given case. In one section the conveyance can only be de- "feated by proof that the creditor, or vendor, had reason to believe "that the debtor was insolvent, and intended a preference or fraud, "while in the other, proof of either one is sufficient. After a care- "ful consideration of the question, I cannot bring my mind to the "conclusion that any such distinction was intended by the Legisla- "ture. No good reason has been shown in support of the claim, "beyond the literal reading, and none is perceived by the Court. "I therefore conclude that they should be continued as speaking "the same language on this point, and as the rule prescribed by "the 35th section is more consonant to reason and securtity in the "transaction of business, I hold that it is the one intended, and "the distinction raised by the letter of the 39th section must yield."

"These two sections," says Judge Blatchford, in Black *vs.* Secor, 7 Bank. Reg., 81, "are in pari materia, and must be construed "together." He also says, "there is, however, no conflict between "them, and they are of the same purport and tenor."

Judge Shipman, in the case referred to, also says: "It will be "seen at a glance that this (35th) section renders the transfer of "property void, only when the party benefitted by such transfer, "or receiving it, has reason to believe both that the debtor was in- "solvent and that a fraud on this Act was intended. . . . Under

"this section of the Bankrupt Act, they (the Courts) have no "authority to declare a transfer void, unless the party who received "it has reason to believe that it was intended to prefer one creditor "over another, or, in some way, to defeat or delay the operation "of the Act."

It was held by Judge Blatchford, in Re Rosenberg, 3 Bank. Reg., 33, that a chattel mortgage, executed within seven days of the filing of the petition in bankruptcy, $250 of which was for a prior indebtedness, and $1000 for a then present consideration, was valid where there was no evidence that the mortgagee had no reasonable cause to believe that it was made in fraud of any provisions of the Bankrupt Act.

It was also held, in Campbell *vs.* Traders' Bank, 3 Bank Reg., 124, that "Where a man acts without knowledge of the condition of "the party, or of anything to create a suspicion of his solvency, and "in good faith obtains a payment or security, then the Bankrupt "Law will not interfere with it."

The same principle was decided by the late Judge Field, in Re. John B. Wright, 1, Bank. Reg. 155 (citing Buckingham *vs.* McLean, 13 Howard, 150) who also defines the meaning of the term "Insolvency" as used in the Bankrupt Law, and holds, that the word "Bankruptcy," as therein used, means something more than "Insolvency," and he refers to a decision of Judge Nelson, in Bank *vs.* Truax, 1 Bank. Reg., 146, in which he says: "In-"solvency, within the meaning of the Bankrupt Act, when applied "to traders, means inability to pay debts in the ordinary course of "their business, as persons carrying on trade usually do."

It means, therefore, to be essential, that to deprive a creditor of his security, who has apparently been given a preference by one in an insolvent condition, there must be shown, first, reason on the part of the creditor to believe that the debtor intended a fraud on the Act, and, second, that the creditor had reasonable cause to believe that the debtor was insolvent at the time the preference was made or security given.

The jury, in their findings upon the issues framed, absolve Mrs.

Fretton from all fraud or collusion with the bankrupt, or guilty knowledge of his condition and intent, at the time the warrant of attorney was given, and there is no evidence before the Auditor to show that Born intended a fraud upon the Bankrupt Act. There is no evidence to infer that Mrs. Fretton had reason to believe that Born contemplated bankruptcy when he gave her the bond and warrant of attorney, and, in the opinion of the Auditor, the findings of the jury are reconcilable and consistent with the decisions herein cited.

The authorities referred to and quoted are conclusive to his mind, that, by the findings of the jury upon the issues as framed, the said judgment in favor of Mrs. Fretton is a valid lien, and entitled to come in upon the fund in Court.

He therefore reports the following distribution:

Fund paid into Court by the Sheriff, . .		$7,247 65
Deduct therefrom Mortgage heretofore ordered to be paid by the Court, ...		2,055 00
Leaving the present distribution, . . .		$5,192 65
From which must be first deducted the expense of this Audit, viz:		
Auditor's fee (interlocutory and final reports),	$300 00	
Advertising, ...	31 65	
Searches, ...	5 50	
Prothy's Comm., Checks, &c., . .	88 35	
" cost of issues and exemplification of same,	13 00	438 50
Leaving for distribution, . .		$4,754 15
To A. V. Parsons, Esq., Attorney for Frederica Fretton, the amount of judgment, D. S. B., D., 67, 355, $4500, with interest to July 6th, 1868, and $1,25 costs, . . .		$4,628 75
Leaving a balance of		$125 40

Which is awarded to C. W. Hornor and S. V. Mays, Esqs., assignees in bankruptcy, of the estate of said August Born, bankrupt.

The annexed searches disclose a judgment against August Born,

in favor of G. Rappold, obtained in this Court on the 20th January, 1868, D. S. B., D, 57, 389½, for $1000.

This judgment, which was entered prior to the proceedings in bankruptcy, was represented before the Auditor at the first meeting, held October 12th, 1868, by John A. Clark, Esq., of counsel for Rappold, but at a subsequent meeting, the Auditor was informed by Mr. Clark that no claim upon the fund would be made under it. The said balance of $125,40 is therefore awarded to the assignees in bankruptcy.

All of which is respectfully submitted,

EDWIN F. CHASE, *Auditor.*

IN THE

Supreme Court of the United States.

MAYS & HORNER, ASSIGNEES,
vs.
FREDERICA FRETTON.

No. 56.

SUPPLEMENTAL BRIEF FOR DEFENDANT IN ERROR.

Since the Counter Statement and Argument for the Defendant in Error was printed the seventeenth volume of Wallace's Reports has been published, and the case of Wilson *vs.* City Bank, cited on page 9 of said Counter Statement, appears on page 473, *et seq.*, of said volume.

Further: Within a recent period the Supreme Court of Pennsylvania has decided the case of Sleek *et al. vs.* Turner's assignee. It was a feigned issue between a judgment creditor and the assignee of the bankrupt, like the present.

The opinion of the Court, delivered by Judge Sharswood, is reported in the *Legal Intelligencer* of September 25th, vol. 31. Opinion delivered 25th of May, last: "A judgment note dated more than four months prior to the adjudication of bankruptcy, but judgment in execution issued thereon within that time is not *ipso facto* fraudulent. It requires something more than mere passive non-resistance to invalidate a judgment and levy when the debt is really due and the defendant has no defence." In that case the Court say: "It is clear that Turner did not procure the judgment to be entered on the 26th of February, 1872, within four months of the filing of the petition. As to the entry he was entirely passive. He had made and delivered the judgment note on October 4th, 1871, more than four months before the petition for an honest debt, to which he could interpose no defence. He

was entirely passive so far as the entry of the judgment was concerned. How, then, could he be said in any sense to have procured the judgment and execution, and thereby given the defendant a preference."

In the case now before the Court a jury have found there was no fraud against the Bankrupt Law. An auditor has reported that there was no fraud. A jury have found that Mrs. Fretton did not know, nor had she reason to believe that Born was insolvent. The Court below pronounced a judgment on that verdict. The District Court of Philadelphia, and the Supreme Court of the State have sustained the report of the Auditor and the judgment of the District Court. How then can it be contended that there was any fraud in the case, or that the claim of the assignees has not been properly adjudicated?

We also call the attention of the Court to the case of Keller *vs.* Denmeed & Son, found in 18th, P. F. Smith, page 449, for two purposes:—First, to show that the Supreme Court of Pennsylvania fully recognizes the right of an assignee in bankruptcy to make his claim to a fund in Court, if he has any. Second, to show that the doctrine laid down in Biddle's appeal, already referred to in argument, is again sustained. The note at the heading of the case is this:—"It is held where materials were furnished, and a lien filed under the mechanics' lien law of the State, the lien having been filed in due time, and subsequently the defendant was adjudged a bankrupt; the premises passed to the assignee subject to the lien, which was to be enforced in the State Court, and not in the United States Bankrupt Court."

When in the present cause the State tribunal permitted the assignees in bankruptcy to come before them and assert their claim, but under the facts proved on the trial, it was shown to the satisfaction of all the Courts in the State, that there was a prior lien by a judgment creditor. Can it be argued that there has been any violation of the Bankrupt Law? Suppose the bankrupt had a judgment that passed to his assignee, and he came into the State Court and claimed the money, and it was decided that there were prior judgments to whom the money must be awarded would that authorize the assignee to bring a writ of error to the Supreme Court of the United States? And such is the question now for

adjudication by this Court. The State Court has decided that the defendant in error had a prior lien to that of the assignee, on facts not controverted, but found against the assignees. What standing then have they in this Court?

We also refer to the case of Piper, assignee of Berger, *vs.* Baldy, in Bankruptcy, decided in the United States Circuit Court for the Western District of Pennsylvania. Opinion by Strong, Judge, delivered June 9th, 1874, and is as follows:—(Published in the *Legal Intelligencer*, October 2nd, 1874.)

"The object of this bill is to set aside eleven judgements obtained by Edward H. Baldy, the defendant, against Levi Berger, who has been adjudged bankrupt; and the relief asked is based upon the averment that the judgments were entered in fraud of the Bankrupt Law. There is very little controversy in regard to the facts. It appears by the evidence, as well as by the pleadings, that the bankrupt, for several years prior to his bankruptcy, carried on business as a builder and lumberman, at Danville, in the county of Montour; and in addition to this he was the lessee of a planing mill, in the city of Williamport, during part of the years 1873 and 1874. He bought and sold lumber, and ran a planing mill at Danville; also at various times, during the years he was thus in business, he borrowed from Baldy, the defendant, different sums of money, giving at the time each loan was made a bill, single, for the sum borrowed, containing a confession of judgment for the debt and interest. The first of these bills was dated April 6th, 1869. Three others were given in the same year; five others in the year 1870; one in 1872; and the last, February 6th, 1873. Though each of them contained a confession of judgment, no judgment was entered on the record of the Court of Common Pleas until June 26th, 1873, thirty-three days before Berger was adjudged a bankrupt. When the petition was filed does not appear. Then the judgments were entered in the Common Pleas at the instance of Baldy, without any agency of the debtor, so far as it appears, and without his knowledge. The entry was made in virtue of an Act of the State Legislature, enacted February 24th, 1806, which empowers the prothonotary of any Court of Record, on the application of any person, being the original holder (or assignee of such holder), of a note, bond or other instrument of writing, in which judgment is confessed, or containing a warrant

for an attorney-at-law or other person to confess judgment, to enter judgment against the person or persons who executed the same without the agency of an attorney or declaration filed."

Such are the circumstances preceding and atttending the entry of the judgments, so far as it is now necessary to state them; and the question to be answered is, whether they exhibit a case which would justify me in declaring that the judgments were entered in violation of the letter or spirit of the Bankrupt Act? And clearly, if they were, it must be because of the provisions of the 35th Section of that Act. Those provisions are, that "if any person, being insolvent, or in contemplation of insolvency, within four months before the filing of the petition by or against him, with a view to give a preference to any creditor or person having a claim against him, or who is under any liability for him, procures any part of his property to be attached, sequestered, or seized on execution, or makes any payment, pledge, assignment, transfer or conveyance of any part of his property, either directly or indirectly, absolutely or conditionally, the person receiving such payment, pledge or assignment, transfer or conveyance, or to be benefitted thereby, or by such attachment, having reasonable cause to believe such person is insolvent, and that such attachment, payment, pledge, assignment or conveyance is made in fraud of the provisions of this Act, the same shall be void." I think it quite clear this provision has reference to payments, pledges assignments, transfers, conveyances or attachments, made to satisfy or secure an antecedently existing debt or liability, and not to debts incurred, for which a full consideration was received by the debtor when he gave the pledge or transfer, &c. In the latter cases nothing is withdrawn from the general creditors. The man who borrows money, and gives at the time of the loan a security for the repayment, does no act which can be hurtful to others having claims upon him; and I cannot think the Bankrupt Act intended to make such a transaction unlawful—so it has been substantially decided in Tiffany vs. Boatmen's Saving Institution, a case recently ruled in the Supreme Court, but not yet reported. There it was said, "the preference at which the law is directed, can only rise in case of an antecedent debt. To secure such a debt would be a fraud on the Act, as it would work an unequal distribution of the bankrupt's property, and therefore the debtor and creditor are alike prohibited from giving or receiving any security for a debt already incurred.

if the creditor has good reason to believe the debtor to be insolvent. But the giving of securities when the debt is created is not within the law; and if the transaction be free from fraud, in fact the party who loans the money can retain them until the debt is paid."

It is unnecessary to quote the other clause of the 35th Section of the Act, known as the Six Months' clause, for it is not claimed, nor indeed could it be, that the present case is affected by it.

Now it is to be observed that all the loans made by the defendant to the bankrupt, except one, and all the confessions of judgment, except one, were made more than nine months prior to the adjudication of bankruptcy. The exception is of the loan and confession, dated February 6, 1873. The confessions of judgment were all given to secure debts, contracted at the time they were given——— loans then made to the debtor. It is true the entries of the judgments on the records of the Court of Common Pleas were not made until June 26th, 1873. Those entries, however, were not acts of the bankrupt. When they were made he was neither a party nor a privy to them in any such sense, I think, as to render them fraudulent, because of collusion with his creditors. To avoid judgments obtained for debts of a bankrupt, under the clause of the 35th Section of the Bankrupt Act, quoted, it is necessary that several things should appear. Not only must the debtor have been insolvent, or contemplating insolvency, but he must have given the judgment, or procured it to be given, within four months before the filing of the petition by or against him, with a view to give a preference; and the creditor must have had reasonable cause to believe that the debtor was insolvent, and that the judgment was given in fraud of the provisions of the Act. It seems to me quite evident that the view or intent to give a preference, contemplated by the Act, must be an intent existing in the mind of the debtor when the preference is attempted; that is, in case of a judgment when the judgment is entered. But how can a debtor be said to intend a wrongful preference at the time the judgment is obtained against him, when he is ignorant of the fact that a judgment is being obtained? That he may, years before, have contemplated the possibility that a judgment might thereafter be obtained against him; that years before he may have given a power of attorney to confess a judgment, or by his own confession, as in this case, have put it in the power

of his creditor to obtain a judgment, is, in my opinion, wholly unimportant to the inquiry. Whether he had in view an unlawful preference within four months next prior to his bankruptcy; for it is a fraudulent intent existing within those four months which the Act of Congress has in view. I cannot, therefore, assent to the doctrine which is said to have been recognized in some cases, that if a debtor has given a bond with a warrant of attorney to confess a judgment, and afterwards, within four months prior to the filing of a petition in bankruptcy, by or against him, a judgment is entered by virtue of the warrant, he must be regarded as having given the judgment, having in view at the time of its entry a preference for the judgment creditor. I agree that such a confession by his attorney is, in contemplation of law, his act, but I deny that it warrants any inference of an intended fraud on the Bankrupt Law. The present, however, is not such a case. The judgments were not entered by virtue of any warrant of attorney. They were confessed by the debtor when the loans were made, and the subsequent entries of record were made not by the authority of the bankrupt, but under the sanction of an Act of Assembly. Neither directly nor indirectly, therefore, was any act done by the bankrupt, within four months next prior to his bankruptcy, evidence of an intent to give a preference. For this reason, then, if no other, I must hold there is no evidence before me that Berger had in view, on the 26th of June, 1873, when the eleven judgments were entered of record in the Common Pleas, a preference of Baldy over other creditors; hence the case is not covered by the 35th Section of the Act of Congress. Nor do I think there is any satisfactory evidence that the defendant either knew or had reasonable cause to believe that Berger was insolvent at the time the judgments were entered of record, or at any time prior to the entry; that Berger was insolvent in June, 1873, because quite manifest afterwards. But I do not discover any reason Baldy had for suspecting his solvency until after the judgments were entered; none, indeed, until later judgments in favor of others were recorded. Berger was carrying on his business as usual, and that business was very large, amounting, as the proof is, to $200,000 between July, 1872, and July, 1873. There is no evidence that his entire solvency was doubted by any one until after the Baldy judgments were put on record. The Danville Bank continued to discount for him large amounts of his business papers until after July, 1873, and the Bank in Danville did likewise, and in addition

gave him accomodation discounts; and that Baldy knew or even suspected he was insolvent is incredible, in view of the facts that he suffered the judgments to remain unentered so long, and did not cause executions to be issued after they were entered, though the greater part of the debtor's property was personality, and his real estate was greatly insufficient to satisfy the debt. No doubt the effect of the entry of the judgments was to preciptiate Berger's failure and the stoppage of his business. But I have sought in vain for any evidence of apparent or probable insolvency before the entry. It has been argued that the loans were part due, and that this should have awakened suspicion in the defendant's mind. It would have some importance if the loans were evidenced by commercial paper, but I regard it as of no significance in view of the well known habits of business in the interior of Pennsylvania.

It is contended also that the defendant was the attorney of the bankrupt; he had made some collections for him, a very few, and had drafted some mortgages and agreements; but it does not appear that he was a confidential adviser at all; certainly not to such an extent as to warrant the conclusion that he must have known or might have known the debtor's pecuniary position or the extent of his resources and liabilities, before the whole, therefore, without regard to anything contained in the Act of June 22d, 1874, amendatory of the general Bankrupt Act. I should be of opinion no case has been presented to justify my holding any of the eleven judgments of the defendant against the bankrupt to be invalid. But the amendatory act, it appears to me, relieves the case from all possibility of debate. Its 11th Section enacts that "nothing in the 35th Section of the general Act shall be construed to invalidate any loan of actual value, or the security therefor, made in good faith upon a security taken in good faith on the occasion of the making of such loan." It is conceded the loans of money made by the defendant were made in good faith, and that the confession of judgment in the bills, single, were taken in good faith where the loans were made. Beyond doubt, these confessions authorized the entry of the judgments at the time they were entered of record, unless the authority was invalidated by the 35th Section of the Bankrupt Act; that it was not, the amendment determines.

The bill must therefore be dismissed with costs.

It is submitted that the principles decided in the above cited case are conclusive of the one now before the Court.

All the *facts* material to bring our case within the doctrines decided were found by a jury and by the auditor in favor of the defendant in error.

The second issue was, whether at the time of the giving of the warrant of attorney, the said F. Fretton *had* reasonable cause to believe the said August Born was insolvent. This fact was found by the jury and the auditor in her favor.

The fourth issue was, whether the warrant of attorney *was given* to the said Frederica Fretton as a preference over the other creditors of the said August Born. This issue was found in her favor; therefore the present case is not one within the 35th Section of the Bankrupt Law. Ours was precisely such a debt as that referred to by the learned Judge when he says: "The Act does not apply to debts incurred for which a full consideration was received by the debtor when he gave the pledge and transfer. In the latter case nothing is withdrawn from the general creditors." It was upon such a state of facts proved on the trial that a verdict and judgment was rendered for the defendant in error, sustained by the State Courts.

And it is submitted that there is nothing in our case which can vary it from the doctrine laid down by the learned Judge in the case just cited.

If this Court will examine the record it will be found that there is no fact in the cause proven by which the case can be brought within the provisions of the 35th Section of the Bankrupt Law.

It is found by the jury, and also by the auditor, that the defendant had no reasonable cause to believe that Born was insolvent. If we may be permitted to depart from the record, it was proved by Born himself that when he gave the judgment bond he believed he was solvent.

And the learned Judge further remarks: "But the giving securities when the debt is created is not within the law, and if the transaction be free from *fraud in fact*, the party who loans the money can retain them until the debt is paid." In the case now

before the Court it has been found by the verdict of a jury that there was *no fraud in fact*. It has also been decided by an auditor (whose finding is conclusive in Pennsylvania), that there *was no fraud in fact* when the judgment bond was given. The judgment was entered of record under the provisions of the Statute of the State, and the debtor was not present. Hence we contend that the case just cited decides the one now before this Court.

And we will conclude our remarks as to the application of the authority, cited by a quotation from the report of the auditor:

"The jury in their findings upon the issues framed absolve Mrs. Fretton from all fraud or collusion with the bankrupt, or guilty knowledge of his condition and intent at the time the warrant of attorney was given, and there is no evidence before the auditor to show that Born intended a fraud upon the Bankrupt Act. There is no evidence to infer that Mrs. Fretton had reason to believe that Born contemplated bankruptcy when he gave the bond and warrant of attorney, and in the opinion of the auditor, the findings of the jury are reconcilable and consistent with the decisions herein cited." (See page 26 of the Counter Statement.)

Now, in the case last cited, the learned Judge says: "To avoid judgments obtained for debts of a bankrupt, under the 35th Section of the Bankrupt Act, quoted, it is necessary that several things appear: Not only must the debtor have been insolvent or contemplating insolvency, but he must have given the judgment or procured it to be given, within four months before the filing of the petition by or against him, *with a view to give a preference*, and the creditor must have had reasonable cause to believe that the debtor was insolvent, and that the judgment was given in fraud of the provisions of the Act." None of these things appear in our case; but, on the contrary, it is found by the jury and auditor that such were not the facts. No insolvency was contemplated by Born; he did not give the judgement *with a view to give a preference, nor had Mrs. Fretton reasonable cause to believe the debtor was insolvent*, nor was the judgment given in fraud of the provisions of the Act. There was no such intent existing either in the mind of the debtor or creditor at the time; so speaks the record in our cause.

We do not understand that the denial of the motion to dismiss

this writ of error (which motion was made and denied at a prior term), for want of jurisdiction, precludes an inquiry into that question at this hearing of the cause on the merits. The Court, by that denial, as we apprehend, simply say, that *prima facie* this case brings into discussion the construction of an Act of Congress, and hence, this tribunal will hear the cause.

But if, at this hearing, it shall be made to appear after a more full examination of the record, and of all the facts of the case, and of the law applicable thereto, that although *prima facie*, an Act of Congress was introduced as an element into the litigation, yet that fact alone will not give this Court jurisdiction, and it will dismiss this writ for want of jurisdiction as well at this stage of the cause as at any other.

It is a principle too familiar to require the citation of authority to support it, that the question of jurisdiction may be raised and will be decided at any stage in the the course of legal proceedings.

Hence then, we invite the attention of the Court at this hearing to a close scrutiny of this record. We claim that it is plain and palpable that there is no jurisdiction in this Court to hear, examine or review the action of the Supreme Court of Pennsylvania. This transcript shows not only that there is no case here upon the merits, and that the Supreme Court of that State committed no error in its decision, but that the plaintiffs in error have no right to be here at all. The question decided is one within the sole and exclusive jurisdiction of the Court which determined it.

If then, this Court should come to the conclusion that it has no jurisdiction, and shall therefore dismiss this writ; or, if having jurisdiction, it should find that the decision of the Supreme Court of Pennsylvania was not erroneous, we shall respectfully ask, that in the exercise of its discretion, the Court shall award to us the ten per cent. damages provided for by its twenty-third rule.

The language of that rule is thus: "In all cases where a writ of error *shall delay the proceedings on the judgment of an inferior Court*, and *shall appear* to have been sued out *merely for delay*," the ten per cent. damages shall be awarded.

Mr. Phillips, in his valuable work on the Practice of this Court, page 191, well says: "It is not practicable to define what circumstances will induce the Court to consider the case one of delay, and

therefore properly subjected to the penalty of ten per cent. damages," and he then refers to the several cases where the rule has been applied. To those cases we ask the attention of the Court.

The facts, which fully appear in this record, and on which we base this claim, are these: Judgment was entered on a mortgage in favor of the defendant in error. The case was referred to an auditor. The plaintiff in error appeared, making allegations that the judgment was void, because it was in fraud of the Bankrupt Act. These were denied by the defendant in error, and an issue demanded (under the rules and practice of the District Court of Philadelphia), which was tried by a jury and a verdict rendered in her favor. A motion for new trial followed, which was overruled. The case again went to an auditor, who, after hearing the parties, reported in favor of the defendant in error. Exceptions to that report were overruled, and the report affirmed. An appeal to the Supreme Court of Pennsylvania was taken by the plaintiff in error, and the judgment of the District Court of Philadelphia was affirmed. Then followed the writ of error.

We respectfully submit that these facts plainly show that this writ of error *did delay and has delayed the proceedings of the judgment of the Inferior Court.*

Here is a fund of several thousand dollars paid into Court by the Sheriff, which the defendant in error has been over and over again declared to be entitled to, and of which she has been deprived by reason of a writ of error sued out in the face of four several adverse judgments, and involving a question of the actual jurisdiction of this Court to act at all in the premises.

Not only is the delay thus clearly shown, but we also claim that it does plainly appear from this record that this writ has been sued out *merely for delay.*

We therefore ask the exercise of the discretion of this Court in our favor, and the award of ten per cent.

J. H. PARSONS,
A. V. PARSONS,
For Defendant in Error.